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SUPREME COURT, U.S.

TRANSCRIPT-OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 500 / 9

UNITED STATES OF AMERICA, PETITIONER,

VS.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

PETITION FOR CERTIORARI FILED DECEMBER 9, 1955

CERTIORARI GRANTED JANUARY 23, 1956

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 560

UNITED STATES OF AMERICA, PETITIONER,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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[Caption omitted]

In the District Court of the United States for the Eastern District of Virginia, Sitting as a Court of Claims

Civil Action No. 1477

[File endorsement omitted]

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, A CORPORATION,
PLAINTIFF

v.

UNITED STATES, DEFENDANT

COMPLAINT—Filed March 10, 1952

To: The District Court of the United States for the Eastern District of Virginia Sitting as a Court of Claims

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal office in the City of Richmond, within the Eastern District of Virginia, and is and for many years has been, including the time hereinafter stated, a common carrier of passengers and freight in interstate and intrastate commerce, and jurisdiction of this matter against the United States, defendant, arises under the Act of Congress commonly known as the Tucker Act, 28 U.S.C.A. 41 (20).

2. Defendant owes the plaintiff the sum of \$9,657.69, with interest, for unpaid transportation charges due under applicable published schedules, classifications and tariffs on file with the Interstate Commerce Commission and the State Corporation Commission of Virginia, on various shipments transported for the United States, in accordance with the Account attached hereto.

WHEREFORE, plaintiff demands judgment against the defendant for the said sum of \$9,657.69, with interests and costs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
By: Meade T. Spicer, Jr., Attorney,

Address: 1103 Mutual Bldg.,
Richmond 19, Va.

3

EXHIBIT TO COMPLAINT-ACCOUNT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY (CHESAPEAKE DISTRICT)

CLAIM OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY VERSUS THE UNITED STATES GOVERNMENT FOR UNPAID TRANSPORTATION CHARGES IN THE AMOUNT OF \$9,657.69 DUE ON ITS BILLS 2-39557-6/46, 2-39994-6/46, 2-40294-7/46, 2-40515-7/46, 2-40527-7/46, 2-40677-7/46, 2-40729-7/46, 2-40781-7/46, 2-40784-7/46, 2-40786-7/46, 2-40791-7/46, 2-40852-7/46, 2-40853-7/46, 2-40863-7/46, 2-28445-5/42, 2-28735-5/42, 2-28737-5/42, 2-28745-5/42, 2-28746-5/42, 2-32745-8/42, 2-33924-9/42, 2-52378-6/43, 2-52864-6/43, 2-53147-6/43, 2-53148-6/43 and 2-53660-6/43 COVERING SHIPMENTS DETAILED BELOW AND IN THE ACCOMPANYING STATEMENT IDENTIFIED AS EXHIBIT "A"

Amount due Plaintiff on its bills in Exhibit "A"

Paid by Government check on 10/25/47 bill 2-40515-7/46

Paid by Government check on 9/22/50 bill 2-40515-7/46

Paid by Government check on 2/20/47 bill 2-40527-7/46

Paid by Government check on 10/26/47 bill 2-40677-7/46

Paid by Government check on 8/31/46 bill 2-40863-7/46

269.27

\$11,208.56

11.87

30.56

118.20

22.53

452.43

Amount deducted by Government because of alleged overpayment of prior bills as per statement below

Subsequent payments made on bill 2-37333-11/42, 3/11/48

Subsequent payments made on bill 2-51192-5/43, 3/16/48

33.98

33.11

10,756.13

67.09

Net amount deducted by Government because of alleged overpayment of prior bills as per statement below

Amount that should have been deducted as per statement below

10,689.04

1,031.35

Balance due Plaintiff as per statement below

\$ 9,657.69

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. is Entitled	Amount Deducted from C&O Bills, See Exhibit A	Balance Due
				Gross	Net					
Ten carloads of Freight Chassis, Seat Cabs and Bodies K.D. from Pontiac, Mich. to Newport News, Va. covered by waybills 7592 to 7601 Inc. of 12/15/41.										
2-28445-5/42	12/18/41	WQ 4495006	27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			30,000	1.12		336.00				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
4			38,340	59		226.21				
2-28445-5/42	12/18/41	WQ 4495006	38,340	59		226.21				
		Unloading & Reloading	38,340	59		226.21				
		"	"	"		53.25				
		"	"	"		53.25				
		"	"	"		43.32				
		"	"	"		21.66				
		Storage	"	"		15.43				
						237.39				
						3,479.17	3,551.20	72.03	1,508.19	1,436.16

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. is Entitled	Amount Deducted from C&O Bills, See Exhibit A	Balance Due
				Gross	Net					
Ten carloads of Freight Chassis, Seat Cabs and Bodies K.D. from Pontiac, Mich. to Newport News, Va. covered by waybills 9355 to 9364 Inc. of 12/26/41										
2-28735-5/42	12/30/41	WQ 4501673	27,300	1.12		305.76				
			2,065	83		17.14				
			36,400	1.12		407.68				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			27,300	1.12		305.76				
			4,130	83		34.28				
			42,600	1.12		477.12				
			38,340	59		226.21				
			40,000	59		236.00				
		Unloading & Reloading				63.48				
		"				53.25				
		"				64.93				
		"				21.66				
		Storage				228.40				
						3,801.83	2,867.72	65.89	1,783.66	1,717.77

5 Ten carloads of Freight Chassis and Seat Cabs K.D. from Pontiac, Mich. to
Newport News, Va. covered by waybills 9978 to 9987 Inc. of 1/2/42

2-28737-5/42	1/ 7/42	WQ 4501676	36,400	1.12	407.68
			36,400	1.12	407.68
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			27,300	1.12	305.76
			4,130	83	34.28
			Unloading & Reloading		20.58
			"		53.25
			"		53.25
			Storage		56.08
					204.23

3,923.07	4,018.91	95.84	2,075.17	1,979.33
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C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. is Entitled	Amount Deducted from C&O Bills, See Exhibit A	Balance Due
				Gross	Net					
Ten carloads of Freight Chassis and Seat Cabs from Pontiac, Mich. to Newport News, Va. covered by waybills 10787 to 10796 Inc. of 1/9/42										
2-28745-5/42	1/13/42	WQ 4501685	36,400	1.12		407.68				
			36,400	1.12		407.68				
			27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
2-28745-5/42	1/13/42	WQ 4501685	27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
			27,300	1.12		305.76				
			4,130	.83		34.28				
		Unloading & Reloading				53.25				
		"				56.08				
		"				56.08				
		Storage				17.75				
						189.35				
						3,908.19	4,004.03	95.84	2,075.17	1,979.83

Ten carloads of Freight Chassis, Seat Cabs and Bodies K.D. from Pontiac, Mich.
to Newport News, Va. covered by waybills 10797 to 10806 Inc. of 1/9/42

2-28746-5/42	1/13/42	WQ 4501686	36,400	1.12	407.68
			27,300	1.12	305.76
			4,130	.83	34.28
			27,300	1.12	305.76
			4,130	.83	34.28
			27,300	1.12	305.76
			4,130	.83	34.28
			27,300	1.12	305.76
			4,130	.59	24.37
			40,000	.59	236.00
			38,340	.59	226.21
			40,000	.59	236.00
			38,340	.59	226.21
			40,000	.59	236.00
		Unloading & Reloading			64.98
		"			53.25
		"			61.07
		Storage			20.58
					205.75

CFA 490-A, B.T. Jones ICC 2767

3,323.98	3,381.81	57.83	1,248.47	1,190.64
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Seventeen carloads of Passenger Automobiles (Jeeps) and Freight Trucks from West Carteret, N. J. to Newport News, Va. covered by waybills 2981, 2982, 2984, 2987, 2988, 2990, 2994, 2998, 3005, 3006, 3007, 3009, 3015, 3017, 3021, 3022 and 3049 of May 1943

8	2-52378-6/43	5/31/43	WQ 15367491	27,558	72	198.42
			WQ 15367464	27,558	72	198.42
			WQ 15367455	36,744	72	264.56
			WQ 15367479	36,744	72	264.56
			WQ 15367460	27,558	72	198.42
			WQ 15367456	20,000	57	114.00
			WQ 15367470	40,700	57	231.99
			WQ 15367463	40,700	57	231.99
			WQ 15367459	21,400	57	121.98
			WQ 15367480	40,700	57	231.99
			WQ 15367494	26,280	72	189.22
			WQ 15367725	35,040	72	252.29
			WQ 15367482	26,280	72	189.22
			WQ 15367466	36,744	72	264.56
			WQ 15367468	36,744	72	264.56
			WQ 15367481	36,744	72	264.56
			WQ 15367478	36,744	72	264.56
	2-52378-6/43	6/ 4/43	Storage			10.51
			"			7.88
			"			8.27
			"			11.02
			"			11.02
			"			8.27
			"			7.88
			"			8.27
			"			11.02
			"			11.02
	2-52378-6/43	6/ 2/43				11.02
						11.02
	2-52378-6/43	5/31/43				11.02
						11.02

TL 72-A, W.S. Curletts ICC A-445

3,862.50 3,862.50

549.02

549.02

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. is Entitled	Amount Deducted from C&O Bills, See Exhibit A	Balance Due
				Gross	Net					
Twenty seven carloads of Freight and Passenger Autos (Jeeps) from West Carteret, N. J. to Newport News, Va. covered by waybills 2977, 3016, 3019, 3030, 3003, 2999, 3014, 2996, 2997, 2992, 2961, 2980, 2937, 3010, 3008, 3004, 2976, 3291, 3307, 3314, 3322, 3321, 3313, 3323, 3308, 3306, 3320, of May 1943 and June 1943										
2-52864-6/43	5/30/43	WQ 15367450	42,210	57			240.60			
	5/31/43	WQ 15367490	35,040	72			252.29			
	6/ 2/43	WQ 15367504	28,400	72			204.48			
		WQ 15367493	36,744	72			264.56			
	5/31/43	WQ 15367483	27,558	72			198.42			
		WQ 15367472	36,744	72			264.56			
		WQ 15367489	36,460	72			262.51			
		WQ 15367474	36,744	72			264.56			
		WQ 15367473	36,744	72			264.56			
		WQ 15367469	38,950	57			222.02			
		WQ 15367436	38,950	57			222.02			
		WQ 15367453	38,950	57			222.02			
9	5/30/43	WQ 15367408	39,110	57			222.93			
2-52864-6/43	5/31/43	WQ 15367488	36,744	72			264.56			
		WQ 15367484	27,558	72			198.42			
		WQ 15367476	36,744	72			264.56			
		WQ 15367448	78,220	57			445.85			
	6/16/43	WQ 15367575	22,000	52			114.40			
		WQ 15367589	22,000	52			114.40			
		WQ 15367600	21,366	52			111.10			
		WQ 15367917	21,366	52			111.10			
		WQ 15367921	21,366	52			111.10			
		WQ 15367599	21,366	52			111.10			
		WQ 15367918	21,366	52			111.10			
		WQ 15367596	21,366	52			111.10			

WQ 15367597	21.366	52	111.10
WQ 15367590	21.366	52	111.10
Storage			7.05
"			11.02
"			11.69
"			11.69
"			12.66
"			23.47
"			11.73
"			11.69
"			11.02
"			10.57
"			8.27
"			8.27
"			11.02
"			10.94
"			11.02
"			11.02

TL 72-A, W.S. Curletts ICC A-445

5,579.59 5,579.59

563.25

563.25

Eighteen carloads of Freight and Passengers Automobiles (Jeeps) from West Carteret, N. J. to Newport News, Va. covered by waybills 2970, 2974, 2964, 2940, 2978, 2986, 2995, 2971, 2975, 2968, 3000, 2993, 3060, 2969, 2947, 2954, 2948, 3316 of May 1943 and June 1943

2-53147-6/43 5/30/43

WQ 15367445	39.010	57
WQ 15367449	39.010	57

222.35
222.36

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. i Entitleds	Amount Deducted from C&O Bills, See Exhibit A	Balance Due
				Gross	Net					
2-53147-6/43	5/30/43	WQ 15367425	39,170	57		223.27				
10		WQ 15367413	40,000	57		228.00				
		WQ 15367452	39,110	57		222.93				
	5/31/43	WQ 15367454	38,950	57		222.02				
		WQ 15367461	20,000	57		114.00				
	5/30/43	WQ 15367447	42,210	57		240.59				
		WQ 15367446	39,010	57		222.36				
		WQ 15367444	42,210	57		240.60				
	5/31/43	WQ 15367475	26,744	72		192.56				
	6/ 2/43	WQ 15367471	38,950	57		222.02				
	6/ 4/43	WQ 15367703	36,318	72		261.49				
	5/30/43	WQ 15367441	40,000	57		228.00				
		WQ 15367418	40,700	57		231.99				
		WQ 15367422	40,700	57		231.99				
		WQ 15367416	39,110	57		222.93				
	6/17/43	WQ 15367598	22,000	52		114.40				
		Storage				8.02				
		"				11.73				
		"				12.66				
		"				10.90				
		"				5.84				
		"				11.69				
		"				11.70				
		"				11.69				
		"				12.66				
		"				11.70				
		"				11.70				
		"				11.73				
		"				11.70				
		"				11.73				

12.21
12.21
11.75

TL 72-A W.S. Curletts ICC A-445

4,055.48 4,127.48 72.00 109.60 37.60

11 Five carloads of Freight and Passenger Automobiles (Jeeps) from West Carteret, N. J. to Newport News, Va. covered by waybills 3023, 2983, 3050, 3294 and 3315 of May and June 1943

2-53148-6/43	6/ 2/43	WQ 15367497	26,280	72	189.22
	5/31/43	WQ 15367458	38,950	57	222.02
	6/ 4/43	WQ 15367727	26,280	72	189.22
	6/17/43	WQ 15367576	22,000	52	114.40
		WQ 15367582	22,000	52	114.40
		Storage			7.88
					11.67
					7.88

TL 72-A, W.S. Curletts ICC A-445

856.69 856.69 78.84 78.84

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Correct Charges	Originally Billed and Paid	Overpayment to which Govt. is Entitled	Amount Deducted from C&O Bills, See Exhibit A	Balance Due	
				Gross	Net						
Fifteen carloads of Freight and Passenger Automobiles (Jeeps) from West Carteret, N. J. to Newport News, Va. covered by waybills 3279, 2985, 3067, 2960, 2962, 2966, 2958, 2955, 2929, 2941, 2930, 2959, 2965, 2938, 3312 of May and June 1943. One carload of Freight Trailers from Bayonne, N. J. to Newport News, Va. covered by waybill 6712 of 6/18/43. Four carloads of Gasoline from Port Newark, N. J. to Newport News, Va. covered by waybills 5172, 5173, 5165 and 5180 of 6/6/43											
2-53660-6/43	6/17/43	WQ 15367567	21,366	52		111.10					
	5/31/43	WQ 15367456	21,105	57		120.30					
	6/4/43	WQ 15367707	26,280	72		189.22					
	5/30/43	WQ 15367437	40,700	57		231.99					
		WQ 15367435	39,010	57		222.36					
		WQ 15367439	40,700	57		231.99					
		WQ 15367423	40,700	57		231.99					
		WQ 15367420	40,700	57		231.99					
		WQ 15367406	39,110	57		222.93					
		WQ 15367428	39,110	57		222.93					
		WQ 15367411	42,210	57		240.60					
		WQ 15367434	42,210	57		240.60					
		WQ 15367438	42,210	57		240.60					
		WQ 15367409	40,000	57		228.00					
		WQ 15367584	39,060	57		222.64					
	12	6/22/43	WQ 8037161	22,400	41		91.84				
		6/27/43	WQ 14076442	71,395	31		221.32				
			R/C				6.93				
2-53660-6/43	6/22/43	WQ 14076441	74,905	31		232.21					
		R/C				6.93					
	6/22/43	WQ 14076481	89,335	31		276.94					
		R/C				6.93					
	6/23/43	WQ 14076455	72,175	31		223.74					
		R/C				6.93					

12

Storage

"
"
"
"
"
"
"
"
"
"

12.21
10.51
11.70
11.73
11.73
11.73
12.21
12.21
12.21
9.33
12.66
12.66
12.66

TL 72-A, W.S. Curletts ICC A-445

2-33838-9/42
2-34213-9/42
2-39954-1/43
2-42014-2/43
2-52976-6/43
2-53385-6/43

2-40527-7/46 Cleared by Journal Entry 11/10/46

Office of Auditor of Station Accounts and Overcharge Claims
Richmond, Virginia
March 14, 1951

4,416.56	4,416.56		39.42	39.42
Total		532.72	10,190.41	9,657.69
224.10	257.00	32.90	32.90	
1,035.14	1,184.43	149.29	149.29	
963.32	1,130.30	166.98	166.98	
407.48	438.14	30.66	30.66	
191.65	267.41	75.76	75.76	
314.42	357.06	42.64	42.64	
		40	40	
Grand Total		1,031.35	10,689.04	9,657.69

16 U. S. OF AMERICA VS. CHESAPEAKE AND OHIO RAILWAY CO.

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EXHIBIT "A"

DETAIL OF CHESAPEAKE AND OHIO RAILWAY COMPANY BILLS 2-39557 6/46, 2-39994 6/46, 2-40294 7/46, 2-40515 7/46, 2-40527 7/46, 2-40677 7/46, 2-40729 7/46, 2-40781 7/46, 2-40784 7/46, 2-40786 7/46, 2-40791 7/46, 2-40852 7/46, 2-40853 7/46 and 2-40863 7/46 COVERING VARIOUS SHIPMENTS AS DETAILED BELOW

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Charges
				Gross	Net	
2-39557-6/46	5/14/46	WV 8696346 Refg. Charge	48825	57	52942	258.49 48.00
					Total	306.49
2-39994 6/46	6/13/46	WV 8545493	3075	2.62		80.57
2-40294-7/46	6/22/46	WW 1690132	47685	1.35	85695	408.64
2-40515-7/46	6/25/46	WV 9955287	31800	.82	72800	231.50
		Ice	10000	4.35NT		21.75
		Salt	500	.75		3.75
		Swg.				.80
		Ice	6100	4.55NT		13.87
		Salt	305	.75		2.29
		Swg.				.80
		Ice	2000	4.55NT		4.55
		Salt	100	.75		.75
		Swg.				.50
		Ice	1100	4.55NT		2.51
		Salt	55	.75		.41
		Swg.				.80
	6/11/46	WV 8552166	25755	1.05	86491	222.76
	6/ 6/46	WV 9954961	31800	.78	69260	220.25
		Ice	10000	4.35NT		21.75
		Salt	500	.75		3.75
		Swg.				.80
		Ice	5300	4.55NT		12.03
		Salt	265	.75		1.99
		Swg.				.80
		Ice	1000	4.55NT		2.28
		Salt	40	.75		.30
		Swg.				.80
		Ice	1400	4.55NT		3.19
		Salt	70	.75		.53
		Swg.				.80
		Ice	2900	4.55NT		6.60
		Salt	145	.75		1.09
		Swg.				.50
		Ice	1200	4.55NT		2.73
		Salt	60	.75		.45
		Swg.				.50
					Total	788.18
2-40527-7/46	7/ 8/46	WW 111044	24000	48		115.20
	5/21/46	WW 8005074	60152	44		264.67
			4715	48		22.63
			12810	63		80.70
			1700	44		7.48
	7/ 3/46	WW 1690109	24000	13		31.20
		WW 1690110	43400	13		82.42

40527-7/46	7/ 3/46	WW 3411918	45700	39		178.23
		R/C				2.97
	6/11/46	WW 1329227	41280	44		181.63
	7/ 3/46	WW 3419920	48000	39		187.20
		R/C				2.97
	6/18/46	WW 3360877	67340	Var.		195.04
	7/10/46	WW 3199671	48000	41		196.80
	7/ 8/46	WW 1727122	23000	39		93.60
		WW 1727123	24000	39		93.60
	6/29/46	WW 1690089	68163	13		88.61
	6/29/46	WW 1690087	67050	13		83.27
	7/ 9/46	WW 1690140	24000	13		31.20
		WW 1690141	24000	13		31.20
	7/ 4/46	WW 3361787	68094	29		197.47
			105	36		38.
	7/11/46	WW 3570284	20000	49		98.00
	7/12/46	WW 5244145	24000	42		100.80
	7/10/46	WW 592390	55414	1.46		809.04
		10%				80.90
	6/15/46	WW 6288226	100800	21		211.68
	6/25/46	WW 6288656	67760	32		216.83
	6/28/46	WW 6288657	43086	32		137.88
	3/28/46	WW 8084018	38500	19		73.15
		Storage				30.56
					Total	3,927.31
40677-7/46	7/ 5/46	WW 1690127	36375	18		65.48
	7/12/46	WW 696668	618 Mi	09¢ per mile		55.62
	7/16/46	WW 3570298	20000	49		98.00
		WW 649242	35600	62		220.72
			28700	59		169.33
	7/17/46	WW 3570307	20000	49		98.00
		WW 3238678	34400	57		196.08
		WW 3238680	34400	57		196.08
		WW 3238679	32400	57		184.68
		WW 3238681	34400	57		196.08
		WW 3238676	28400	57		161.88
		WW 3238677	32400	57		184.68
		WW 3238682	34400	57		196.08
	7/18/46	WW 3570283	20000	49		98.00
	7/ 6/46	WW 5244142	38880	41		159.41
	7/ 6/46	WW 5244141	24900	37		92.13
	7/ 8/46	WW 649209	32832	36		118.20
	6/27/46	WW 5244135	25000	38		95.00
	7/18/46	WW 4244150	24000	42		100.80
		WW 5244149	24000	42		100.80
					Total	2,787.05
40729-7/46	7/18/46	WW 3570301	20000	49		98.00
	7/19/46	WW 5244148	24000	42		100.80
					Total	198.80
40781-7/46	7/19/46	WW 4580808	78750	36		275.63
40784-7/46	7/16/46	WX 8112001	20897	Var.		299.60
40786-7/46	7/ 5/46	WX 9216913	105200	2.93NT		154.12
	7/ 8/46	WX 9216914	108600	2.93NT		159.10

18 U. S. OF AMERICA VS. CHESAPEAKE AND OHIO RAILWAY CO.

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EXHIBIT "A"

DETAIL OF CHESAPEAKE AND OHIO RAILWAY COMPANY BILLS 2-39557-6/46, 2-39994-6/46, 2-40294-7/46, 2-40515-7/46, 2-40527-7/46, 2-40677-7/46, 2-40729-7/46, 2-40781-7/46, 2-40784-7/46, 2-40786-7/46, 2-40791-7/46, 2-40852-7/46, 2-40853-7/46 and 2-40863-7/46 COVERING VARIOUS SHIPMENTS AS DETAILED BELOW

C&O Bill	Date of Delivery	Bill of Lading	Weight	Rate		Charges
				Gross	Net	
2-40786-7/46	6/14/46	WX 9216910	94500	2.85NT		134.66
	6/17/46	WX 9216907	101100	2.85NT		144.07
	6/19/46	WX 9216907	111100	2.85NT		158.32
	6/21/46	WX 9216909	101000	2.85NT		143.93
	6/24/46	WX 9216911	98300	2.85NT		140.08
	6/25/46	WX 9216912	101400	2.85NT		144.50
					Total	1,178.78
2-40791-7/46	7/12/46	WW 8347408	6483	3.72	2.37232	153.80
	7/19/46	WW 8838333	230	1.53	1.34385	3.09
					Total	156.89
2-40852-7/46	7/22/46	WV 1399167	7057	6.08	3.96959	280.13
	7/22/46	WV 9951095	601	Var.		11.38
	6/1/46	WV 1329509	100	2.26	1.81301	1.81
		Less P.U. and Del.				- 10
					Total	293.22
2-40853-7/46	7/23/46	WV 7333977	82865	16		132.58
		WV 7333999	66403	Var.		109.66
	7/22/46	WV 7333909	25691	Var.		66.80
					Total	309.04
2-40863-7/46	7/22/46	WW 3407177	2892	59		17.06
		WW 3407178	186	59		1.10
		WW 3407300	117	59		.69
		WW 648453	100	1.23		1.23
		Less P.U.				- .05
	6/20/46	WW 3425905	2430	1.08		26.24
		WW 3425906	8973	1.08		96.91
	7/23/46	WW 3238480	216	57		1.23
	7/20/46	WW 1727157	238	Var.		2.23
		WW 3362631	5800	59		34.22
		WW 1715108	880	39		3.43
		WW 3407023	100	1.07		1.07
		WW 3362402	740	75		5.55
	7/22/46	WW 1730776	218	89		1.94
		Less P.U.				- .11
	7/16/46	WW 3406821	601	Var.		5.62
					Total	198.36
					Grand Total	11,208.56

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EXHIBIT "B"

STATEMENT OF SHIPMENTS INCLUDED IN CHESAPEAKE AND OHIO RAILWAY COMPANY BILLS 2-28445-5/42, 2-28735-5/42, 2-28737-5/42, 2-28745-5/42 and 2-28746-5/42 THAT WERE NOT EXPORTED THRU NEWPORT NEWS, VA. BUT WERE RESHIPPED TO DESTINATIONS INDICATED

C&O Bill	Bill of Lading	Car	Reshipped to	Bill of Lading
2-28445-5/42	WQ 4495006	EJE 32775	Bloomfield, N. J.	WQ 5230694
		PLE 42459	"	WQ 5230688
		"	"	WQ 5228683
		Pmcky 91603	"	WQ 5228694
		B&LE 36233	"	WQ 5230692
		"	"	WQ 5230681
		PLE 41842	"	WQ 5228176
		CN 141509	"	WQ 5230682
		PLE 43213	"	WQ 5228178
		Pa 336547	"	WQ 5220152
		Pa 853343	"	WQ 6233092
		CNJ 85982	"	WQ 6232903
2-28735-5/42	WQ 4501673	CN 141446	"	WQ 6233094
		"	"	WQ 5228683
		BLE 36368	"	WQ 5226814
		NKP 70430	"	WQ 5226808
		"	"	WQ 5228148
		PM 18568	"	WQ 5228165
		PLE 45204	"	WQ 5226811
		"	"	WQ 5228164
		"	"	WQ 5228173
		PLE 44711	"	WQ 5228168
		Erie 19463	"	WQ 5227839
		Pa 335160	New Cumberland, Pa.	WQ 5226807
		Pa 823080	"	WQ 5230098
		NKP 70359	"	WQ 6232905
-28737-5/42	WQ 4501676	PM 18702	Bloomfield, N. J.	WQ 6232901
		"	"	WQ 5230679
		Erie 10518	"	WQ 5228176
		GTW 145337	"	WQ 5228175
		"	"	WQ 5228179
		Milw 360827	"	WQ 5228167
		"	"	WQ 5230694
		CBQ 795346	"	WQ 5230682
		CBQ 196205	"	WQ 5228162
		"	"	WQ 5228172
		PM 18590	"	WQ 5228170
		Milw 350034	"	WQ 5230693
		Erie 14544	"	WQ 5230691
		"	"	WQ 5228168
		"	"	WQ 5228104
		"	"	WQ 5228175
2-28745-5/42	WQ 4501685	CN 141205	"	WQ 5230688
		UP 57185	"	WQ 5226810
		Pa 810824	"	WQ 5228153
		CNW 72201	"	WQ 5228151
		"	"	WQ 5228167
		CNW 43083	"	WQ 5226817
		"	"	WQ 5227841

EXHIBIT "B"

STATEMENT OF SHIPMENTS INCLUDED IN CHESAPEAKE AND OHIO RAILWAY COMPANY BILLS 2-28445-5/42, 2-28735-5/42, 2-28737-5/42, 2-28745-5/42 and 2-28746-5/42 THAT WERE NOT EXPORTED THRU NEWPORT NEWS, VA. BUT WERE RESHIPED TO DESTINATIONS INDICATED

C&O Bill	Bill of Lading	Car	Reshipped to	Bill of Lading
		PLE 46983	Bloomfield, N. J.	WQ 5220152
		" "	"	WQ 5228162
		Rdg 21403	"	WQ 5228166
		EJE 80451	"	WQ 5228171
		EJE 80488	"	WQ 5220152
		EJE 80488	"	WQ 5228163
		LV 31498	"	WQ 5228151
		" "	"	WQ 5228170
		LV 31471	"	WQ 5226818
2-28746-5/42	WQ 4501686	Milw 361026	"	WQ 5226809
		WLE 70573	"	WQ 5226812
		Pmcky 91642	"	WQ 5226807
		" "	"	WQ 5227837
		B&O 258104	"	WQ 5227841
		" "	"	WQ 5228739
		Pa 751330	"	WQ 5226802
		StPM&O 88023	"	WQ 5230099
		Pa 854172	"	WQ 5232902
		Rdg 24837	"	WQ 5232901
		Pa 863585	"	WQ 5230099
		PLE 43071	"	WQ 5230100

18-20

AFFIDAVIT

STATE OF VIRGINIA:

City of Richmond, to-wit:

Personally appeared before me, H. K. Hawthorne, Jr., a notary public in and for the City of Richmond, in the State of Virginia, C. E. Weaver, Jr., who made oath in due form of law that he is Auditor of Revenue and Agent of The Chesapeake and Ohio Railway Company, and the Account hereto annexed, in the sum of \$9,657.69 is correct, and is justly due and owing to The Chesapeake and Ohio Railway Company, with interest thereon until paid, to the best of his knowledge, information and belief.

C. E. WEAVER.

Sworn to and subscribed before me, this 10th day of March, 1952.

H. K. HAWTHORNE, JR.,

Notary Public.

My commission expires July 26, 1955.

21 In the District Court of the United States for the Eastern District of Virginia, Sitting as a Court of Claims

[File endorsement omitted]

[Title omitted]

STIPULATION OF COUNSEL—Filed January 23, 1953

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, as follows:

1. That some or all of the claims in this action present the same issues of law and fact as are presented by the case of *The Chesapeake and Ohio Ry. Co. v. United States*, in the District Court of the United States for the Eastern District of Virginia, Civil Action No. 1268.

2. That further proceedings in this action shall be stayed until there is a final judgment in No. 1268, *supra*.

3. That the final judgment in No. 1268, *supra*, shall govern the disposition of the claims involved in this action to the extent that it is applicable.

4. It is understood that the final judgment in No. 1268 refers to the judgment after all rights of appeal have been exhausted, if either party should determine to appeal from any judgment of the District Court in No. 1268.

Dated: _____

MEADE T. SPICER, JR.,

Counsel for Plaintiff.

A. CARTER WHITEHEAD,

United States Attorney.

RICHARD E. LEWIS,

Ass't. United States Attorney.

22 In the United States District Court for the Eastern District
of Virginia, Richmond Division

[File endorsement omitted]

[Title omitted]

ANSWER—Filed March 17, 1954

Comes now the defendant, United States of America, in an answer to the plaintiff's Complaint and admits the allegation contained in Paragraph 1 and admits the allegation contained in Paragraph 2, except that it denies it is indebted to the plaintiff in the amount of \$9,657.69.

WHEREFORE, the defendant, the United States of America, demands judgment in its behalf, together with its costs and expenditures.

L. S. PARSONS, JR.,
United States Attorney,
311 Post Office Building,
Richmond, Virginia.

R. R. RYDER,
Assistant United States Attorney,
311 Post Office Building,
Richmond, Virginia

CERTIFICATE OF MAILING (omitted in Printing)

23 In the United States District Court for the Eastern District
of Virginia, Richmond Division

[File endorsement omitted]

[Title omitted]

ORDER ON PRE-TRIAL CONFERENCE—December 10, 1954

At a pre-trial conference with counsel held at Richmond on December 9, 1954, it was determined and is now ORDERED that:

(1) The motion of the defendant to refer this case to the Interstate Commerce Commission to determine whether the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported, is denied.

(2) The question for determination by the Court at the hearing of this case on its merits is whether the ultimate exportation of the

shipment, or any part thereof, results in causing the export tariff rate to Newport News applicable in the instant case for transportation of such shipment, or any part thereof as may have been so exported

(3) In so far as the related cases now pending will be affected thereby the decision of this case will be controlling.

STERLING HUTCHESON,
United States District Judge.

December 10, 1954.

24 In the United States Court for the Eastern District of Virginia, Richmond Division

[File endorsement omitted]

[Title omitted]

STIPULATION OF FACTS—Filed February 10, 1955

Now comes The Chesapeake and Ohio Railway Company, plaintiff, by and through its undersigned attorney of record, and the United States of America, defendant, by and through L. S. Parsons, Jr., United States Attorney for the Eastern District of Virginia, and hereby stipulate that the following facts are to be taken as true and correct in this action, without prejudice to objection to materiality and relevancy, and under the best evidence rule.

1. The plaintiff is a corporation organized and existing under the laws of the State of Virginia and is a common carrier by railroad, operating in interstate commerce, and connects with, and performs through services in conjunction with, other such common carriers by railroad who participated in the through transportation services involved in this case.

2. This is an action under the Tucker Act for the collection of balances of transportation charges on various shipments transported by the plaintiff for the defendant. Included in the Account or Schedule of Charges annexed to the plaintiff's Bill of Complaint, are Line-haul Freight Charges which accrued on fifty car-load shipments of Freight Chassis, Seat Cabs and Bodies, consigned and transported on government bills of lading from Pontiac,

25 Michigan, to Newport News, Virginia, on various dates in the period from December 10, 1941, through January 31, 1942, under applicable tariffs and classifications in effect, and delivered to the consignee at Newport News, Virginia, and unloaded on a pier controlled by the government.

3. The said shipments were made in good faith by the Government, with the intention that the articles therein would be exported

from Newport News to the Republic of China, pursuant to the Lend-Lease Act of March 11, 1941, by way of the port of Rangoon, Burma. Except for the fall of Rangoon to the Japanese military forces on March 8, 1942, the shipments would have been exported accordingly.

4. Defendant now offers to present evidence alleged to show the facts set forth in the attached photostat, Exhibit 1.

5. At the time the shipments were consigned and transported from Pontiac, Michigan to Newport News, Virginia, there was on file with the Interstate Commerce Commission and in effect, Central Freight Tariff No. 218-M, attached hereto as Exhibit 2 to this Stipulation of Facts.

6. The plaintiff, as delivering carrier at Newport News, Virginia, rendered bills for the line-haul transportation charges from Pontiac, Michigan, to Newport News, and said bills were paid initially by Army disbursing officers in substantially the amounts billed, such charges being computed by the use of the established domestic freight rates published in Central Freight Tariff No. 190-A, on file with the Interstate Commerce Commission and in effect. Upon subsequent audit of the payment vouchers, the General Accounting Office of defendant several years thereafter, recovered back from the plaintiff, the difference between such sums and the lesser sums calculated respectively, by said office, at the existing export freight tariff rates, by making deductions from amounts otherwise due to

the plaintiff by the defendant, on other bills for other and different transportation services performed, by virtue of
26 Title 49 U. S. Code, Annotated, Section 66.

7. The question for determination is, whether the published domestic freight tariff rates between Pontiac, Michigan, and Newport News, Virginia, are properly applicable to the shipments involved, or whether the lower export tariff rates are applicable thereto.

8. The title page of said Central Freight Tariff No. 218-M, and pages 81, 331, 333, 334 and 362 thereof are attached hereto as "Exhibit A" to this Stipulation of Facts.

Agreed:

R. R. RYDER,

Assistant United States Attorney.

Agreed:

MEADE T. SPICER, JR.,

Counsel for Plaintiff.

February 10, 1955.

27 In the District Court of the United States for the Eastern
District of Virginia at Richmond

[File endorsement omitted]

[Title omitted]

PLAINTIFFS MOTION TO REJECT PROOF OFFERED BY DEFENDANT—
Filed February 10, 1955

Plaintiff moves that the proof offered by defendant, in support of a contention that certain portions of some of the shipments on which charges are sought to be collected herein, were subject to an export rate from Pontiac, Michigan to Newport News, Virginia, be rejected and excluded by the Court, upon the following grounds:

1. The ultimate alleged exportation of such shipments was not in compliance with the applicable published tariffs in effect, namely, Central Freight Tariff No. 218-M.
2. The defendant voluntarily converted the shipments into domestic shipments before they were ultimately exported.
3. The articles left the possession of the carrier and were transported to other domestic points, and were stored and reboxed by a private contractor at various storage places, prior to being exported.
4. The articles were not exported from Newport News, Virginia, but from Pacific Coast points, to which the tariffs in effect had no application.
5. The articles ultimately exported were not the identical articles as originally consigned from Pontiac, Michigan.
6. Exportation did not take place within any reasonable time after delivery at Newport News, Virginia, under the circumstances.
7. Defendant enjoyed other export rates from the Pacific Coast points to India.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
By: MEADE T. SPICER, JR., Its Attorney.
Address: 1103 Mutual Building,
Richmond, Virginia.

28 In the United States District Court for the Eastern District of Virginia, at Richmond

[File endorsement omitted]

[Title omitted]

FINDINGS OF FACT—February 10, 1955

The Facts are as set out in the filed Stipulation of Facts; the plaintiff's account annexed to the Bill of Complaint; the Exhibits filed, and the proof submitted at the hearing, showing that the amount of transportation charges unpaid and owing to the plaintiff under the published domestic freight tariff in effect, for the transportation services rendered as alleged by the plaintiff, is Nine Thousand Five Hundred and Seventy-One Dollars and Thirty-Six Cents (\$9,571.36).

Conclusions of Law

The proof tendered by the defendant to the effect that after the shipments involved in the movement from Pontiac, Michigan, had been delivered to the defendant at Newport News, Virginia, some of such shipments or portions thereof were exported from ports other than Newport News, does not, under the tariffs in effect, cause the export freight rates to apply to such movement, and hence the only rate properly applicable thereto, is the domestic rate.

STERLING HUTCHESON,
United States District Judge.

Date: February 10, 1955.

29-33 In the District Court of the United States for the Eastern District of Virginia, at Richmond

[File endorsement omitted]

[Title omitted]

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF

UNITED STATES, DEFENDANT

ORDER—February 10, 1955

This day came the parties, by their respective attorneys, and filed a signed Stipulation of Facts. The defendants offered to present proof of the facts contained in Exhibit No. 1 attached to said

Stipulation of Facts, and thereupon the plaintiff filed its motion in writing to reject and exclude the said proof offered by the defendant, and also presented oral testimony of witnesses in support of its Bill of Complaint and of its said motion;

Whereupon, the Court having maturely considered the Stipulation of Facts, and the pleadings and evidence, including the Exhibits and the oral testimony presented, and the arguments of counsel, and being of opinion that the plaintiff's motion to reject the proof tendered by the defendant should be sustained, doth sustain said motion and doth reject and exclude such proof:

No further evidence or defenses being presented, and the Court being of opinion that the plaintiff is entitled to recover for transportation charges in the amount set forth in the account attached to its Bill of Complaint, namely, \$9,657.69, subject to an admitted credit of \$86.33. *It Is Therefore Considered by the Court*, that the plaintiff do recover of the defendant, the United States, the sum of Nine Thousand Five Hundred and Seventy One Dollars and Thirty-Six Cents (\$9,571.36).

STERLING HUTCHESON,
United States District Judge.

Date: February 10, 1955.

I ask for this:

MEADE T. SPICER, JR., p. q.

I have seen and object to this:

R. R. RYDER, p. d.

34 Clerk's Certificate to foregoing transcript omitted in printing.

35 In the District Court of the United States for the Eastern District of Virginia, Richmond Division

Civil Action No. 1477

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

v.

UNITED STATES OF AMERICA

TRANSCRIPT OF TESTIMONY

Before Honorable Sterling Hutcheson, United States District Judge
February 10, 1955

APPEARANCES:

Messrs. Leake & Spicer, by Meade T. Spicer, Esq., For the Plaintiff.

Richard R. Ryder, Esq., Assistant United States Attorney, For the Defendant.

Mr. RYDER: We have prepared a stipulation of facts in the case and have attached to that stipulation two exhibits, Exhibit A and Exhibit 1.

Mr. SPICER: Your Honor, we have made several changes in the last few days, trying to agree on a stipulation, and finally got something yesterday afternoon which, I think, covers the situation. We desire to put on a tariff witness to make some explanation of the tariff and another accounting witness to testify as to the amount we claim to be due.

The COURT: Very well.

Mr. SPICER: I do want to say that we have had several conferences, but recently we have had two conferences about this exhibit, in which certain information came out. As I understand, this exhibit is not offered as the proof itself of what happened, but offered as the basis of proof to indicate the nature of the proof.

Mr. RYDER: As we informed Your Honor the other day, it would take a long time to present it in detail, and as far as Plaintiff is concerned, we thought we would try to have something in a
37 legal way to present to Your Honor without having proof at this time. If Your Honor rules that it is competent evidence and should be received, we have it; and if Your Honor says that it will not affect the legal proposition, there is no need to go into it. This is the same principle

The COURT: So the only question for determination at this time is whether the ultimate exportation changes the tariffs as applied to the initial shipment to Newport News?

Mr. SPICER: Yes, sir. We asked for charges from Pontiac, Michigan to Newport News, and the case is similar in every respect to the case tried before Your Honor, one of the cases in which there was a stipulation by Counsel that this was frustrated traffic. The position was taken that Your Honor had not passed on a situation where the goods were exported eventually.

The COURT: After they left the possession of the carrier?

Mr. SPICER: Yes. Our position is that this would not be
38 sufficient to change the rate and make the exportation rate applicable.

Mr. RYDER: We are now offering to prove the facts set forth in Exhibit 1. Those facts in this column show what happened to the goods shipped under the bill of lading referred to in this suit.

The COURT: As I understand, the government is offering at this time to prove that certain portions of these shipments, after having been diverted from Newport News, and after having left the possession of the carrier, were ultimately exported from some other port?

Mr. SPICER: Yes, and I prepared a motion in line to bring our

objection to that proof. We are objecting to your receiving that evidence and ask that it be excluded from these papers. I think after Your Honor reads over the stipulation and if he wants to look at that sheet, I see no reason why Counsel should not enlighten you as to what the sheet is supposed to show without putting in the conversation of Counsel in evidence.

39 The COURT: All right, gentlemen, I think I understand the questions. What is your thought with regard to procedure?

Mr. SPICER: This comes upon motion to exclude evidence, and if Mr. Ryder wants an opportunity to show what the evidence purports to show, or whether it comes up on our motion to exclude.

The COURT: You made some reference to introducing the evidence of the tariff expert.

Mr. SPICER: Yes.

The COURT: Would it be in order to take that now?

Mr. SPICER: Yes.

The COURT: Would that be in support of your motion?

Mr. SPICER: Yes, sir.

40 C. JESSE ADAMS, a witness introduced on behalf of Chesapeake and Ohio Railway Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SPICER:

Q. What is your occupation?

A. Chief of Revisions, Chesapeake and Ohio Railway Company.

Q. Will you explain in a little more detail what the nature of your duties are and what department you are in.

A. I am in the Accounting Department, and I am responsible for the application of the lawfully published tariff rates.

Q. Are you accustomed to dealing with published tariffs and classifications on behalf of the Chesapeake and Ohio Railway Company?

A. That comes within the jurisdiction of my position.

Q. And it is among the duties of the Accounting Department of the Chesapeake and Ohio Railway Company to see that freight charges are collected in accordance with the tariff and freight charges lawfully in effect?

41 A. That is correct.

Q. This is a suit for the collection of charges claimed to be due on certain shipments of freight chassis, seat cabs, and bodies that were consigned in December 1941 and January 1942 by the Yellow Coach and Truck Company from Pontiac, Michigan to Newport News, Virginia. The shipments were on government bills of lading,

they being intended for use by the government to be exported to the Republic of China. The stipulation shows that they were all delivered at Newport News, Virginia and unloaded on the piers, in December 1941 and January 1942.

The Plaintiff has now offered in evidence a certain document which purports to show what happened to these particular shipments, or some of them, none of them having been exported from Newport News upon delivery there by the Chesapeake and Ohio Railway Company. The explanation is that, by reason of the fall of the port of Rangoon early in 1942, they could not go to their destination because the route was via Rangoon to China.

This exhibit indicates that various articles included in these shipments were at a later time exported from a Pacific Coast point to Calcutta, India and shows that in each instance the goods, 42 after remaining at Newport News for three months or more, was shipped by the government on other bills of lading to storage points of the government located at Bloomfield, New Jersey and New Cumberland, Pennsylvania; there being in each instance, apparently, two movements from Newport News to these storage points, that is, first one storage point, and thence to another storage point; and thence to Wilmington, California, the shipments being ultimately consigned to Wilmington, California for export on dates, as indicated, beginning in June 1943, and subsequently exported from Wilmington, California, to India, beginning in the latter part of June 1943.

Have you examined this statement?

A. That is correct. I have examined this statement.

Q. Will you state, in the first place, what rates would be applicable to these shipments if unloaded at Newport News for delivery to the government without the data that is presented to you?

Mr. RYDER: You are asking him to state what rate would be applicable if the shipments left Newport News?

43 Mr. Spicer: What rate would be applicable to the shipments from Pontiac, Michigan. I am not asking for the exact amount, but the rate.

Mr. RYDER: We object.

The COURT: Objection is overruled.

Mr. RYDER: Might I note an exception to the rule? I think the question is one for the Court.

The COURT: I think that is true, but this gentleman is a rate expert.

Mr. RYDER: That is true, but it seems a question for determination by the Court. The set of facts should be taken before the Court and the published tariff and various facts contained in that published tariff, and the Court then should determine as a matter of law whether that tariff applies to that set of facts.

The COURT: I think you are correct in that statement. It is a question for determination by the Court, and the Court has already determined the applicable rate for goods shipped to Newport News and placed in export to be the export rate, and those not exported, those taken to Newport News and left in this country to be
44 the domestic rate, and the only remaining question is whether the export rate is applicable to that part of the shipment which was eventually exported from some other port. That is the only question.

Mr. SPICER: What I want to do is bring out the two which stand unpaid for, where they did not go out of the country, and by contrast, what the situation would be when they followed the course as shown in this exhibit.

The COURT: That is a question which the Court will have to determine, but this gentleman is a rate expert and is not expressing an opinion.

Mr. RYDER: No, he could not express an opinion as to what law governs the facts. That is for the Court to determine. It would seem to me that it would be the same as bringing in an expert on tort law and having him sit on the stand and tell what the law is.

Mr. SPICER: We have to start somewhere. All of us can't pick up a tariff and say, "Here it is."

Mr. RYDER: We understand that the Court previously decided that on the shipment from Pontiac, Michigan to Newport News, Virginia, if these shipments were for export, this
45 export rate was applicable if exported, but if not exported and the shipment stopped in Newport News, the domestic rate applies. That is the law that the Court has decided, but if you take the additional facts, that is, that the shipments were ultimately exported, as we offered to prove by Exhibit 1, then the question for the Court to determine is whether the export or domestic rate applies. I think this witness could testify as to what is the domestic tariff and what tariff controls the domestic rate, but I don't think he can testify as to which of those tariffs apply to this given set of circumstances.

The COURT: Ask your question, Mr. Spicer.

Mr. SPICER:

Q. All I want to get at is his construction. Mr. Adams, under the circumstances under which these shipments were consigned and transported from Pontiac, Michigan to Newport News, Virginia, and
46 had there been no subsequent movement of the goods shown from Newport News, what is the type of rate that would apply to these goods?

The COURT: Let's put it, "What type of rate would the Chesapeake and Ohio Railway Company apply to it?"

Mr. SPICER: All right, sir.

A. We would be governed by the provisions of the domestic tariff CFA-498.

Mr. SPICER:

Q. That is the tariff which shows the domestic rates?

A. Yes; that is the domestic rate.

The COURT: Mr. Ryder, do you object to the question and answer in that form?

Mr. RYDER: Yes.

The COURT: The Record will show that you objected and I overruled your objection.

Mr. SPICER:

Q. Assuming that some of these shipments took the course indicated by the work sheet, Exhibit 1, prepared by the General Accounting Office, what would be your construction, or, the construction of the Chesapeake and Ohio Railway Company, of the proper tariff to apply to such shipments?

Mr. RYDER: We object to his answering that.

The COURT: Objection overruled.

A. The domestic rate to Newport News in CFA Tariff 490-8 would apply.

Mr. SPICER:

Q. What rate would apply to the first movement from Newport News, as indicated on this top sheet, of some of the goods, under your tariff, for the goods which moved to Bloomfield, New Jersey?

Mr. RYDER: We object to his answering any question of that type. I thought this question had been decided.

The COURT: I understand that your objection applies to all of these questions.

A. The character of the movement from Newport News to Bloomfield, New Jersey, would be a domestic rate application.

Mr. SPICER:

Q. Bloomfield, New Jersey, is not on the Chesapeake and Ohio Railway?

A. No.

48 Q. So the movement there would not be a through route over the Chesapeake and Ohio lines, the movement from Newport News to Bloomfield, New Jersey?

A. The Chesapeake and Ohio would jointly handle this traffic with another line. The only line from Newport News is the Chesapeake and Ohio.

Q. But it would not in the course of that movement come back to the Chesapeake and Ohio Railway Company after it left it?

A. That is right. The final destination, Bloomfield, New Jersey, is on another line.

Q. You have stated that you would construe this situation, the export tariff rates, as not being applicable if the shipments took these various routes and went to these various points as shown on this exhibit?

A. That is correct. The export tariff to Newport News would not be applicable.

Q. Can you elaborate on that as to how you meant that answer?

A. Well, there is a restriction in the tariff CFA 218-M, ICC 3432.

49 Q. Is that the tariff showing the export rate, the export rates applicable to these shipments?

A. Yes, which is the tariff from Pontiac, Michigan to Newport News for export.

Q. If any export tariff was applicable to it, that would be the tariff into Newport News?

A. That is correct. The restriction is found in Item No. 23030, p. 333.

Mr. SPICER: Your Honor, that is in Exhibit A.

Q. That is what number?

A. Item 23030, and this restriction reads:

"Application of Export Rates to North Atlantic Seaboard Ports of Export" (Newport News being a North Atlantic seaboard port—I am interpolating that, that is not in the tariff).

"The rates names in this tariff, or as same may be amended, and designated as 'Export Rates' will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been

50 accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given."

Q. Will you give your idea of the meaning of that provision?

A. Reading from the item quoted, the stipulation that traffic is handled direct from carriers' station to steamer's docks at the eastern seaboard stations, would mean that the carrier would have to deliver this over the pier or dock at Newport News to the steamship that would actually export the commodity.

Q. And proof of that fact would have to be given in order for that export tariff to apply?

A. That is correct, "on which required proof of exportation is given," and that relates to that port.

Q. What effect would the shipping of some of these goods
51 to Bloomfield, New Jersey, have, so far as the tariffs are concerned?

A. The movement from Newport News to Bloomfield, New Jersey, or any other inland point would prevent the application of this export tariff rate of 218-M.

Q. It would break the chain?

A. It would definitely be in violation of the tariff.

The Court: That is, upon the assumption that the goods have left the possession of the carrier in the meantime?

A. That is correct.

Mr. SPICER:

Q. And if these goods went to one or more other domestic points, the chain, so to speak, would be broken on the movement?

A. Any shipment other than over the piers at Newport News would prevent the export rate from applying.

Q. Does this tariff you speak of governing the movement from Pontiac, Michigan, to Newport News have any application to shipments that might be moved from Newport News to Pacific Coast points and there exported?

52 A. This tariff has no application on shipments being exported through any Pacific port and only applies to export through Atlantic seaboard ports.

Q. As indicated on the title page?

A. As indicated on the title page and in the Item No. 23030 I have read.

Q. And this tariff is only united in by the carriers that would be concerned in the movement from Pontiac, Michigan, to Newport News, and any carrier in further exportation?

A. This tariff would be confined to the controlling carriers, which would not include any Pacific Coast carrier.

Q. If the shipper in the first instance had desired the shipment to be exported from Pacific Coast points, this tariff would have no application?

A. If it were handled by rail carrier through the Pacific Coast ports, the tariff would have no application.

Q. This tariff has no application to any movement through the Pacific Coast, whether export or import?

A. If you permit me to make a statement, you may become involved in intercoastal tariffs.

53 Q. How long have you been engaged in tariff and transportation work for the Chesapeake and Ohio Railway Company?

A. Over 30 years.

Mr. RYDER: We would again like to object to all the testimony of this witness.

The COURT: I understand your objection applies to all of the testimony with regard to tariffs.

Mr. RYDER: Yes.

Mr. SPICER: I do want to state to the Court that we did have an agreement with Counsel that a tariff witness could be called by each side in the case.

The COURT: That is stated for the purpose of the Record?

Mr. SPICER: Yes.

The COURT: I have overruled the objection.

54 CROSS EXAMINATION.

By Mr. RYDER:

Q. All of the testimony you have given with respect to the application of this tariff and with respect to the application of this particular shipment from Newport News to Bloomfield, New Jersey, is that which the Chesapeake and Ohio Railway Company would apply; is that correct?

A. That is correct.

Q. The Chesapeake and Ohio Railway Company does not have any shipments that go from Newport News to Bloomfield?

A. Yes, sir.

Q. Do you have any lines that go to Bloomfield?

A. We get the movement from Newport News because we are the only carrier out of Newport News.

Q. Where would it go to another carrier?

A. At Potomac Yard.

Q. But the Chesapeake and Ohio has no line from Newport News to Bloomfield?

A. No.

Q. How about to New Cumberland, Pennsylvania?

55 A. That would be possible to haul over the Chesapeake and Ohio as an intermediate carrier.

Q. Suppose a shipment was made from Pontiac, Michigan

to Newport News, but suppose the shipment was held on the dock for a year's time and then exported out of Newport News, would this export tariff apply?

A. My opinion is that it would not then apply without another tariff permitting storage.

Q. So your opinion is that it has to be exported within a reasonable time?

A. That would be my understanding.

Q. Is it also your understanding that if they took a shipment from Pontiac, Michigan to Newport News and that shipment was subsequently diverted to Norfolk and shipped out of Norfolk, export out of Norfolk, that that tariff would not apply?

A. There are provisions at the port which permit exportation from either Norfolk or Newport News, and in that specific instance that would be a type of service available under published tariffs.

Q. How about Baltimore?

A. That would be another port, and any port outside of Newport News or the Norfolk area would take it out of that category
56 of Newport News.

Q. But it would not take it out of the category of the Atlantic Seaboard?

A. That is right, but the provisions of Item No. 23030 provide that it be applied at that port to a steamer or vessel.

Witness stood aside.

57 H. K. HAWTHORNE, JR., a witness introduced on behalf of the Chesapeake and Ohio Railway Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. SPICER:

Q. Mr. Hawthorne, you are employed by the Chesapeake and Ohio Railway Company, are you not?

A. Yes, sir.

Q. In what department?

A. In the Accounting Department.

Q. How long have you been employed in the Chesapeake and Ohio Railway Company's Accounting Department?

A. Something over forty years.

Q. Are you accustomed to handling records covering freight shipments, including bills of lading, freight bills and tariffs, and things of that kind?

A. Yes, sir.

Q. Was there prepared by you or under your supervision an

account to be attached to the bill of complaint when this suit was brought?

A. Yes.

58 Q. The papers indicate that the complaint in this action was filed on March 10, 1952, and there is attached to the complaint an account in which the total amount claimed was \$9,657.69; you may look at it. Was that prepared by you?

A. Yes, sir, that was prepared under my supervision.

Q. And that sets forth the particulars under which these charges were set up in this case?

A. That is right.

Q. Now, is there anything that the Chesapeake and Ohio Railway Company is now prepared to withdraw from that claim?

A. Yes, sir. There are two items that involve a divisional matter that we do not think should correctly be in this case, in the amount of \$86.33, which leaves the correct amount \$9571.36.

Q. Those figures represent the amount due now?

A. Yes, to my best information and belief.

Q. And were they calculated on the export rate or the domestic rate?

A. They were calculated under the domestic rate.

59 Q. Did you confer with the representative of the General Accounting Office in regard to the data shown on this Exhibit No. 1?

A. I did not understand the first part of your question.

Q. Did you confer with the representative of the Accounting Office at the time this Exhibit No. 1 was made available to the Chesapeake and Ohio Railway?

A. Yes, sir.

Q. Did you understand from him what this was?

A. I understood that it was a transcript of information taken from pertinent records lodged with the Department of Army and purporting to show the movement of these shipments to and from various storages and finally.

Q. This particular transcript was made by the General Accounting Office?

A. Yes.

Q. And does not include the records from which it was made?

A. No, sir.

Q. Who was this representative?

A. Mr. Levenstein, of the Special Reports Section.

60 Q. Did you confer with anyone else about it, or did anyone make a visit to you?

A. Mr. Fribourg of the Department of Justice talked with me about it.

Q. Did Mr. Jones confer with you?

A. Yes, he did. Mr. Jones did come to the office.

Q. From your conversations with the General Accounting Office, did that indicate to you what happened to these freight chassis after they left Newport News?

Mr. RYDER: We object to that question. The conference he is speaking about was a conference in an attempt to arrive at a stipulation of facts in this case. What the representative of the General Accounting Office might have said, that these records might have shown, or something of that nature, is immaterial, and I don't think this man can say what they might have said, or those records might have attempted to show. We have offered to prove that those records are correct and offered to prove what they show, and we don't think any evidence in an attempt to add an additional statement of facts is admissible.

61 Mr. SPICER: We avow that this is an intricate document which is not entirely self-explanatory, and this was brought down to Richmond and an explanation was brought out by the General Accounting Office to explain what it purported to represent, and at this conference Mr. Jones made an explanation and wanted us to agree to it as it was, or agree to what it showed. We declined to do that, but tried to work out some way in which the questions involved could be handled in as brief a manner as possible. He stated that the data from which it was taken would be comprised of a number of volumes of testimony, and he attempted to explain to us what it was, and I am simply asking Mr. Hawthorne to give us the benefit of such explanation, rather, to give the Court the benefit of such explanation as he made. There is nobody here from the General Accounting Office of the government.

The COURT: That is Exhibit 1?

Mr. SPICER: Yes.

The COURT: I am rather inclined to believe that it speaks for itself; however, for the purposes of the Record, proceed, and I
62 will determine later whether it should be considered or not.

Mr. SPICER:

Q. State, Mr. Hawthorne, what Mr. Jones indicated or stated happened to the freight chassis shipments after they left Newport News?

A. As near as I recall, Mr. Jones state that these shipments were billed out of Newport News to Bloomfield, New Jersey, for the purpose of placing on crating by the General Motors Corporation, at Bloomfield, and after this change was made and they were placed, they were then sent to New Cumberland for storage and held at that point until they found an overseas destination to which they wished to send the chassis. They were billed out in New

Cumberland some 18 months later and billed for transport to Wilmington, California for transport to Calcutta, India.

Q. Was there any separation of any part of the shipments?

A. Yes, these shipments at Newport News consisted of bodies, in addition to the chassis. Three of the shipments, according to his record, consisted of bodies, which were shipped to New Cumberland direct and later sent to some overseas destination from
63 storage.

Q. You mean, the bodies moved in a separate movement from the chassis?

A. Yes, sir.

Q. Was there a separate charge on the three shipments of bodies, or were they charged with the others?

A. No, I understand that these were the only three in this design.

Q. Did you examine the billing on some of these shipments billed by the Chesapeake and Ohio from Newport News?

A. Yes, sir.

Q. Did that indicate to whom the shipments were consigned at Bloomfield?

A. Yes, sir, General Motors Corporation.

Q. Did Mr. Jones say anything about the status of General Motors Corporation?

A. To the extent that they were acting as agents for the government in the reworking and recrating of the shipments.

Mr. RYDER: We would like to move the Court to strike all the evidence of this witness with respect to his testimony as to
64 what the representative of the General Accounting Office was purporting to say as to what this Exhibit 1 shows.

The Court: The worksheet, by itself, is not altogether self-explanatory in its construction, but I think with the stipulation of Counsel it is understandable, and I doubt if the testimony of Mr. Hawthorne is necessary to clarify it. However, I shall overrule the motion that his testimony be rejected.

Mr. SPICER: I would like to ask one more question, and it will be subject to the same objection.

The Court: All right.

Mr. SPICER:

Q. In the discussion had and examination of that exhibit, does it appear that separate bills of lading were issued after the goods were delivered at Newport News; in other words, did those shipments move on the same bill of lading from Pontiac, Michigan to Calcutta, India?

A. No, sir. There were separate bills of lading, and after it left

B-109040
Export Rates, Class or Co09040 C.A. 1477 C.O. Ry Co.
Class or Commodity, are in effect on Automobiles moving to ports

SHEET #1

INBOUND TO NEWPORT NEWS, VIRGINIA.		FIRST MOVEMENT BEYOND NEWPORT NEWS, VIRGINIA.		SECOND	SECOND MOVEMENT		THIRD MOVEMENT		EXPORT DATE	SHIP MANIFEST INFORMATION.		
		B-L	DATE	DESTINATION	B-L	DATE	DESTINATION	B-L	DATE	NAME OF SHIP	DESTINATION	
WP 4495006	12-10-41	WP 5330894	5-9-42	BLOOMFIELD MAN	WP 522578C	578C	5-22-42	NEW CUMBERLAND PA	WP 16892427	6-2-43	LA 355	CALCUTTA INDIA
							426	"	"	6-25-43	LA 355	CALCUTTA INDIA
							427	"	"	6-25-43	LA 355	CALCUTTA INDIA
							426	"	"	6-25-43	LA 355	CALCUTTA INDIA
							427	"	"	6-25-43	LA 355	CALCUTTA INDIA
							426	"	"	6-25-43	LA 355	CALCUTTA INDIA
					5225775	5775	5-20-42	NEW CUMBERLAND PA	WP 16892362	6-1-43	LA 347	CALCUTTA INDIA
							325	"	"	6-24-43	LA 355	"
					5225780	5780	5-22-42	NEW CUMBERLAND PA	WP 16892427	6-2-43	LA 355	CALCUTTA INDIA
							426	"	"	6-25-43	LA 355	CALCUTTA INDIA
							427	"	"	6-25-43	LA 355	CALCUTTA INDIA
							426	"	"	6-25-43	LA 355	CALCUTTA INDIA
					5225759	5759	5-15-42	NEW CUMBERLAND PA	WP 16892369	6-1-43	LA 347	CALCUTTA INDIA
							376	"	"	"	LA 355	"
					5225762	5762	5-15-42	NEW CUMBERLAND PA	WP 16892375	"	LA 355	"
							376	"	"	"	LA 355	"
					5225759	5759	5-15-42	NEW CUMBERLAND PA	WP 16892369	"	LA 355	"
							376	"	"	"	LA 355	"
					5225762	5762	5-15-42	NEW CUMBERLAND PA	WP 16892375	"	LA 355	"
							376	"	"	"	LA 355	"
							376	"	"	"	LA 355	"
							376	"	"	"	LA 355	"
					5225762	25762	5-15-42	NEW CUMBERLAND PA	WP 16892375	"	LA 355	"
							376	"	"	"	LA 355	"
							376	"	"	"	LA 355	"
							376	"	"	"	LA 355	"
							376	"	"	"	LA 355	"
					5225751	225751	5-16-42	NEW CUMBERLAND PA	WP 16892403	6-2-43	LA 355	"
							424	"	"	"	LA 355	"
					5225753	225753	5-16-42	NEW CUMBERLAND PA	WP 16892360	6-1-43	LA 355	"
							359	"	"	6-24-43	LA 355	"
					5225751	225751	5-16-42	NEW CUMBERLAND PA	WP 16892403	6-2-43	LA 355	"
							424	"	"	"	LA 355	"
					5225750	225750	5-15-42	NEW CUMBERLAND PA	WP 16892356	6-1-43	LA 355	CALCUTTA INDIA
							353	"	"	6-25-43	LA 347	CALCUTTA INDIA
					5225752	225752	5-16-42	NEW CUMBERLAND PA	WP 16892358	"	LA 355	"
							357	"	"	"	LA 356	"
					5225750	225750	5-15-42	NEW CUMBERLAND PA	WP 16892361	"	LA 347	CALCUTTA INDIA
							353	"	"	6-25-43	LA 437	"
					5225752	225752	5-16-42	NEW CUMBERLAND PA	WP 16892355	"	LA 347	CALCUTTA INDIA
							357	"	"	"	LA 347	"
							358	"	"	6-24-43	LA 347	CALCUTTA INDIA
							357	"	"	6-24-43	LA 347	CALCUTTA INDIA
							355	"	"	6-24-43	LA 347	CALCUTTA INDIA
							355	"	"	6-24-43	LA 347	CALCUTTA INDIA
							357	"	"	6-24-43	LA 347	CALCUTTA INDIA
					5225751	225751	5-16-42	NEW CUMBERLAND PA	WP 16892403	6-2-43	LA 347	CALCUTTA INDIA
							424	"	"	"	LA 347	CALCUTTA INDIA

Newport News and left the Chesapeake and Ohio separate bills of lading were issued covering each of the movements.

65 Q. Those bills of lading were not in the possession of the Chesapeake and Ohio Railway Company?

A. No, sir.

Q. But the Chesapeake and Ohio Railway Company was paid its part of the charges on the movement it made from Newport News to Bloomfield, New Jersey?

A. Yes.

Q. Or New Cumberland, whichever place they went?

A. Yes.

Q. And there was no controversy about those charges?

A. No, sir; not as far as I know.

Q. And they were collected on domestic freight rates?

A. Yes, as far as our records show, they were.

Mr. RYDER: I have no questions.

Witness stood aside.

66 CLOSING STATEMENTS OF COURT AND COUNSEL

Mr. SPICER: I think that is all of the evidence.

The COURT: Do you have any evidence, Mr. Ryder?

Mr. RYDER: Nothing beyond what we offered to prove, as set forth in Exhibit 1.

Mr. SPICER: I would like to have the statement in the Record that there is no representative from the General Accounting Office of the government to make any explanation of the records, which made it necessary for me to call for the explanation in the evidence I have just presented.

The COURT: Is there anything further for the Record, gentlemen?

Mr. SPICER: I would like to make a statement that we have a complete copy of the Tariff 218-M, excerpts of which are already in the stipulation. We have a copy to exhibit, and we are not able to say where there are any other copies that are available, but we have it available for inspection and examination by the Court later.

The COURT: You have nothing further for the Record?

Mr. SPICER: No, sir.

67 The COURT: Do you desire, Mr. Ryder, to be heard in opposition to this motion?

Mr. RYDER: No, sir, except we do not agree to the motion and object to it.

The COURT: You object to the motion?

Mr. RYDER: Yes.

The COURT: Gentlemen, as I understood from your statements and from the Stipulation and exhibits, as well as statement of the Counsel, the facts, briefly, are these:

The shipment involved was from Pontiac, Michigan, to Newport News, Virginia, destined for export to Rangoon. Upon arrival at the port of Newport News, the government, due to the fall of Rangoon, diverted, or caused to be diverted, this shipment, which was reshipped to other points in the United States. The goods left the possession of the carrier, the Chesapeake and Ohio Railway Company, without having been exported from Newport News, the Atlantic Seaboard port of proposed exportation. Subsequently, after the goods had left the possession of the carrier, the goods, or
 68 a part of them, were exported from other ports in the United States, but not from Newport News.

The question proposed is whether the export rate is applicable from Pontiac, Michigan, to Newport News, Virginia, and from the stipulations and exhibits and statements of Counsel, independently of the testimony which has been offered, it appears clear to me that the export rate does not apply under said circumstances from Pontiac, Michigan, to Newport News, Virginia; and therefore, proof of ultimate exportation from other ports, as indicated by Exhibit 1, would not change the applicable tariff, which should be the domestic rate from Pontiac, Michigan, to Newport News, Virginia. Therefore, the motion of the Plaintiff to reject proof of ultimate exportation of the shipment will be granted, and the offer of the government, as set out in paragraph four of the Stipulation, will be denied.

Do you gentlemen have any comment concerning the procedure?

Mr. RYDER: The only other thing, then, is to enter judgment order.
 69

The COURT: In the amount set forth?

Mr. RYDER: Yes.

The COURT: Could not an order be entered showing the Court's rejection of the proof?

Mr. SPICER: Yes, and I have presented an order which reads that the Defendant, having no further defense to present, it is considered that the Plaintiff recover the amount as stated.

The COURT: Do you have any contrary suggestion, Mr. Ryder?

Mr. RYDER: I would like to suggest to the Court that the order be changed to read, in the third line, that the Defendant offered to present proof of the ultimate export in accordance with Exhibit 1, rather than a general statement such as this is.

Mr. SPICER: I think that is proper. And I also said "concerning facts," but I could substitute "by pleadings and testimony."

The COURT: "As set forth by Stipulation and Exhibit 1," etc., and I think it would be a good idea for the amount to appear in
 70 the record.

Reporter's Certificate to foregoing transcript omitted in printing.

EXHIBIT "A"

FREIGHT TARIFF (1) 218-1.

Cancels

FREIGHT TARIFF 1 218-1.

Joint, Local, Proportional, Coastwise, Intercoastal, and Export Rates

Applying on
Commodities

From Stations in Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, Pennsylvania, West Virginia, Wisconsin.

Named on pages 24 to 102, inclusive.

To Albany, N. Y., Baltimore, Md., Boston, Mass., New York, N. Y., Norfolk, Va., Philadelphia, Pa.

And other Eastern Points in the United States as provided in Item No. 5.

Including basis for rates to United States Ports for Coastwise and Inter-Coastal traffic as provided in Section 4, and to Canadian Ports for Export and Forwarding as provided in Section 5.

71a Item No. 23030

* * * * *

APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS
OF EXPORT

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given. (C. F. A. Inf. 8179, 13607)

(Here follows Exhibit 1, folio 72)

73 Proceedings in the United States Court of Appeals for the
Fourth Circuit

No. 6998

UNITED STATES OF AMERICA, APPELLANT,

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern
District of Virginia, at Richmond

ARGUMENT OF CAUSE—June 15, 1955

June 15, 1955, (June term, 1955) cause came on to be heard before Parker, Chief Judge, and Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

74 United States Court of Appeals for the Fourth Circuit

No. 6998

UNITED STATES OF AMERICA, APPELLANT,

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE

Appeal from the United States District Court for the Eastern
District of Virginia, at Richmond

Argued June 15, 1955

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Alan S. Rosenthal, Attorney, Department of Justice, (Warren E. Burger, Assistant Attorney General; L. S. Parsons, Jr., U. S. Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and Meade T. Spicer, Jr., (Walter Leake on brief) for Appellee

OPINION—July 14, 1955

PER CURIAM:

This is another case, like *United States v. Chesapeake & Ohio R. Co.*, 4 Cir. 215 F. 2d 213, where the only question involved is whether the export or the domestic freight rate

is properly applicable to a shipment where there was an intention to export at the point of origin but where this intention was abandoned when the shipment reached the port from which exportation was to be made, so that what started out as a shipment for export was converted by the shipper into a domestic shipment. The only difference between this and the former case is that here the goods, after being held at Newport News for more than three months, were shipped by rail to storage centers in Pennsylvania and New Jersey, and, after being held there for more than a year, were shipped across the continent to Wilmington, California, whence they were exported to Calcutta, India. It appears, here, just as clearly as in the former case, that the intention to export to China was abandoned and that the movement which began at Pontiac, Michigan, as an export was converted by the shipper into a domestic shipment. The case, we think, is clearly governed by our former decision and nothing need be added to what was there said.

Appellant insists that there is a difference with respect to its motion to stay proceedings and refer the case to the Interstate Commerce Commission, in that that motion was made in the court below in this case but not in the former one. It is clear, however, that the motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide. There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain.

Affirmed.

77-79 United States Court of Appeals for the Fourth Circuit

No. 6998

UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLEE

JUDGMENT—July 14, 1955

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

JOHN J. PARKER,

Chief Judge, Fourth Circuit.

MORRIS A. SOPER,

United States Circuit Judge.

ARMISTEAD M. DOBIE,

United States Circuit Judge.

August 15, 1955, mandate issued and transmitted to the Clerk of the United States District Court at Richmond, Virginia.

August 15, 1955, record on appeal and exhibits A and #1 returned to the Clerk of the District Court at Richmond, Virginia.

November 22, 1955, record on appeal and exhibits A and #1 received from the Clerk of the District Court.

80 Clerk's Certificate to foregoing transcript omitted in printing.

81 Supreme Court of the United States

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11th, 1955.

EARL WARREN,

Chief Justice of the United States.

Dated this 7th day of October, 1955.

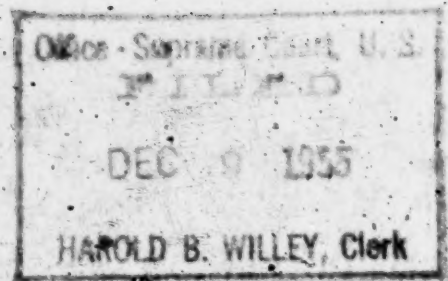
[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 23, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.



No. — 560 19

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys, Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on July 14, 1955.

OPINIONS BELOW

The United States District Court for the Eastern District of Virginia rendered no opinion. The opinion of the Court of Appeals (App. 22-24) is reported at 224 F. 2d 443.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (App. 24-25). On October 7, 1955, the time for filing a petition for a

writ of certiorari was extended by the Chief Justice to and including December 11, 1955 (App. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded the granting of the Government's motion for referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether a challenge to the reasonableness of a tariff rate, as applied in the prevailing circumstances, presents an administrative question calling for resolution by the Interstate Commerce Commission.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. 1 *et seq.* are set out in the Appendix, *infra*, pp. 19-21.

STATEMENT

This action was brought against the United States by respondent Chesapeake & Ohio Railway Company under the Tucker Act, 24 Stat. 505, as

amended, 28 U. S. C. 1346 (a) (2), to recover sums purportedly owing it in connection with the transportation of certain Government property (R. 2).¹ The pertinent facts are undisputed and may be summarized as follows:²

Between December 10, 1941, and January 31, 1942, the United States shipped from Pontiac, Michigan, under Government bills of lading, fifty carloads of chassis, seat cabs and bodies (R. 3-6, 24-25). The freight was consigned to China Defense Supplies Inc.³ at Newport News, Virginia (R. 3-6, 24-25). Notations on each of the bills of lading indicated that the shipments were authorized by the War Department and that the goods involved were the military property of the United States, were moving for a military use, and were intended for exportation to the Republic of China pursuant to the provisions of the Lend Lease Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. 411 *et seq.* (R. 25; App. 26-27. It was the bona fide intent of the Government that the

¹ "R" refers to volume I of the certified record filed in this Court.

² In part, these undisputed facts appear in the findings of the same district judge in an earlier companion action involving shipments made under almost identical circumstances. See pp. 6-9, *infra*. These findings, which by informal agreement between the parties were referred to in the court below, are set forth in the Appendix, pp. 26-32, *infra*.

³ China Defense Supplies was an American corporation which acted as the representative of the Chinese government for the acquisition of military supplies from the United States under the Lend Lease Act (App. 27).

property be forwarded from the port of Newport News, in ocean vessels, to the Republic of China via the port of Rangoon, Burma (R. 25).

Each of the bills of lading also contained symbols indicating that releases had been obtained on the covered shipments (App. 27). The Chief of Transportation of the War Department, in cooperation with the Maritime Commission, was administering a system for the supervision of export shipments of military supplies to facilitate their movement, the primary element of the system being the coordination of domestic transportation to coastal ports with the overseas transportation from such ports (App. 2).⁴

⁴ Pursuant to the Act of June 6, 1941, c. 174, 55 Stat. 242, as implemented by Executive Order 8771, June 6, 1941 (6 F. R. 2759), and the Act of July 14, 1941, c. 297, 55 Stat. 591, the Maritime Commission had requisitioned foreign merchant vessels in American waters and chartered all American vessels for operation consistent with the needs of national defense. Priorities were issued with respect to the loading, fueling and repairing of vessels on the basis of those needs. Subsequently, the Office of Defense Transportation was created to direct and co-ordinate transportation activities with a view towards maximum utilization of existing facilities. Executive Order 8989, December 18, 1941 (6 F. R. 6725). On February 7, 1942, by Executive Order 9054 (7 F. R. 837), the War Shipping Administration was created and the functions of the Maritime Commission in respect to the operation, charter, and requisition of merchant vessels were transferred to it. The Executive Order specifically provided that the vessels under WSA control were to constitute a pool to be allocated by the Administrator for use by the Army, Navy, other federal agencies, and the Governments of the Allied Nations in compliance with strategic military requirements.

The transportation officers of the War Department were not permitted to issue bills of lading without first obtaining a release covering the particular shipment, such release being issued with the view of limiting the tonnage scheduled to a particular port to the capacity of that port for prompt shipment (App. 27-28). The reference in each bill of lading to a release indicated that arrangements had been made prior to shipment for the coordinated movement of the property from Pontiac, Michigan, to Newport News and for export thereafter from Newport News to China, via Rangoon (App. 28).

Upon the arrival of the property covered by the bills of lading at Newport News, delivery was made to the consignee and the goods were unloaded onto a Government-controlled pier (R. 25). On March 8, 1942, the port of Rangoon fell to the Japanese military forces (R. 25). This event cut off all available routes for the transportation of goods between the United States and the intended ultimate destination in the Republic of China (App. 30). As a result, the intended exportation could not be effectuated and the carloads were reshipped to storage centers maintained by the War Department (R. 16-17, 25).

The carrier submitted bills for the line-haul transportation from Pontiac to Newport News based upon the established *domestic* rate published in Central Freight Association, Freight Tariff No. 490-A, Agent B. T. Jones' I. C. C. No.

2767 (R. 25). These bills were paid. However, upon the subsequent audit of the payment vouchers by the General Accounting Office, the charges were recomputed at the lower *export* rate published in Central Freight Association, Freight Tariff No. 218-M, Agent B. T. Jones' I. C. C. No. 3422 (R. 25). The Government thereafter recovered the difference between the two sums by deducting it from amounts due the carrier in connection with other transportation services performed by it (R. 25-26).⁵

On March 10, 1952, respondent brought this action in the District Court to recover the amount of the deduction (R. 2). By stipulation, the proceedings were held in abeyance pending final judgment in Civil Action 1268, instituted by respondent on December 29, 1950 (R. 21). That action involved twenty-four carloads of similar automotive equipment shipped in December 1941 and January 1942 from Pontiac to Newport News for exportation to China via Rangoon (App. 26, 30-31). Like the shipments here involved, their intended exportation was frustrated by the Japanese occupation of Rangoon, whereupon the goods were reshipped to storage centers maintained by the War Department (App. 30). As here, respondent charged and collected the domestic rate and, after administrative set-off by the General

⁵ This procedure is expressly sanctioned by Section 322 of the Transportation Act of 1940, c. 722, Title III, 54 Stat. 898, 955, 49 U. S. C. 66.

Accounting Office based upon the application of the export rate, brought suit (App. 30-31).

At the trial in Civil Action 1268, respondent advanced the theory that the export rate applied solely in circumstances where exportation actually took place from the consignment port. In support of this theory, it relied exclusively on the literal language of Item No. 23030 of Tariff No. 218-M, which read:

APPLICATION OF EXPORT RATES TO NORTH ATLANTIC SEABOARD PORTS OF EXPORT

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The Government's position in No. 1268 was that, whether this Item 23030 rendered the domestic rate applicable as a matter of tariff construction or not, the Interstate Commerce Com-

mission had held in virtually identical circumstances that it would be unreasonable to apply the domestic rate, and that these decisions should be followed. The District Court held, however, that, since there was no showing of actual exportation, the domestic rate was applicable and that the reasonableness of that rate was to be conclusively presumed (App. 32-33). Judgment was accordingly entered for respondent.

On appeal of that case, the Government renewed the position it took in the District Court and urged, in the alternative, that if the lower court had been in doubt as to the applicability of the Commission rulings relied upon by the Government, it should have stayed the proceeding *sua sponte* and referred the question of reasonableness to that administrative body for a determination in the nature of a declaratory judgment. The Court of Appeals rejected both contentions and affirmed the judgment; *United States v. Chesapeake & Ohio Railway Company*, 215 F. 2d 213.* Respecting the application of the tariffs, the court read the relevant Commission decisions as governing solely those situations where, subsequent to the frustration of the intended exportation, the shipper made an effort to export the goods elsewhere (215 F. 2d at 216; App., *infra*, pp. 37-38). As to the matter of referral to the Commission "for an adjudication of the

* For the convenience of the Court, the Court of Appeals' opinion is set forth in the Appendix, pp. 33-39, *infra*.

reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing" (215 F. 2d at 216; App., *infra*, p. 38), the court held that the Government's failure to request the District Court to take such action provided a "sufficient answer" (*ibid.*). It went on to suggest additionally that, since the Government's time for instituting an independent reparations proceeding before the Commission had run, the District Court would have abused its discretion had it stayed the proceedings to enable the question of reasonableness to be presented to the Commission (App., *infra*, p. 39).

Following that decision of the Court of Appeals, a pre-trial conference was held in the instant case (R. 23). At that conference, the Government moved to refer to the Interstate Commerce Commission the question whether "the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported" (R. 23).⁷ In its pre-trial order, the court denied the motion and ruled that the issue to be litigated was whether the ultimate exportation of the shipments would render the export rate applicable (R. 23).

⁷ By virtue of the stipulation entered into before the trial in Civil Action 1268 (see p. 6, *supra*), the Government was foreclosed from challenging the applicability of the domestic rate to that portion of the shipments, if any, which was not eventually exported.

On February 10, 1955, the District Court entered an order rejecting an offer of proof (Exhibit 1, on file with the Court) that a substantial majority of the shipments had been eventually exported and awarding judgment to respondent in the amount of \$9,571.36 (R. 29). On July 14, 1955, the Court of Appeals affirmed in a *per curiam* opinion (App. 22-24). In response to the Government's contention that, at the very least, the Commission decisions relied upon established the unreasonableness of applying the domestic rate to those shipments encompassed by the offer of proof, the court held that the fact of subsequent exportation made no difference (App. 23). In relation to the motion for referral to the Commission, the court stated (App. 23-24):

[T]he motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide. There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power

to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain.

REASONS FOR GRANTING THE WRIT

This case presents the recurring question as to the appropriate procedure to be followed by courts in cases involving an attack upon the reasonableness of the application of a particular tariff rate. In upholding the District Court's denial of the Government's motion seeking referral to the Interstate Commerce Commission for a determination of the reasonableness of the domestic rate as applied to the shipments in issue here, the court below held (1) that Section 16 (3) of the Interstate Commerce Act (App., *infra*, pp. 20-21), requiring independent reparations proceedings to be instituted before the Commission within two years of the rendition of the transportation services, precluded referral; and (2) that in any event the issue which the Government sought to refer was one to be determined judicially rather than administratively. This holding conflicts with decisions of this Court and of other courts of appeals in an important area of judicial administration and, additionally, is at variance with the understanding and practice of the Commission as manifested by decisions of that agency. It therefore should be reviewed by this Court.

1. The holding below that referral of the issue of reasonableness to the Interstate Commerce Commission was precluded by the two-year limitation provision of Section 16 (3) presents the same issue as is raised in *United States v. Western Pacific R. Co.*, in which a petition for a writ of certiorari to the Court of Claims is being filed concurrently. Here, as in *Western Pacific*, the court below apparently believed that the expiration of the two-year limitation period with respect to independent reparation proceedings rendered inapplicable the well-established principle of judicial-administrative comity—a principle which requires that, when in the course of judicial proceedings it develops that a question appropriate for Interstate Commerce Commission determination is involved, the court stay its hand until the Commission has had the opportunity to pass upon it. See e. g., *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 433; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134, 147; *Smith v. Hoboken R. Co.*, 328 U. S. 123, 133.^{*} As is shown in the petition for a writ of certiorari in the *Western Pacific* case (pp. 9–11), the view of the court below that referral was precluded by the limitation provision in question is in

^{*} See, also, *United States v. Kansas City Southern Ry. Co.*, 217 F. 2d 763, 769, 777 (C. A. 8); *Northern Pacific Ry. Co. v. United States*, 213 F. 2d 366, 369 (C. A. 8); *S. S. W. Inc. v. Air Transport Ass'n of America*, 191 F. 2d 658, 664 (C. A. D. C.); *City of New Orleans v. Texas & N. O. R. Co.*, 195 F. 2d 882, 887 (C. A. 5).

square conflict with the decision of the Eighth Circuit in *United States v. Kansas City Southern Ry. Co.*, 217 F. 2d 763 (C. A. 8). For the reasons set forth in the *Western Pacific* petition (pp. 11-19), to which the Court is respectfully referred, we submit that the holding below is erroneous and that the *Kansas City Southern* decision is correct.⁹

2. Equally unsound, in our view, is the further holding below that there were no questions before the District Court calling for resolution by the Interstate Commerce Commission under the "primary jurisdiction" rule, first enunciated by this Court in *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. Underlying this holding is the court's statement that the reasonableness of the domestic tariff rate was not in issue and that the sole question was whether that rate, or the lower export rate, was applicable (App. 23). By this, the court below apparently meant that the Government did not assert that the domestic rate was unreasonable *per se*, i. e., that it could not be lawfully applied in any circumstances to shipments of automotive parts moving between

⁹ In the *Kansas City Southern* and *Western Pacific* cases, the court made the same assumption that was made by the court below, viz, that the limitation provisions of Section 16 of the Interstate Commerce Act apply to Commission proceedings instituted by the Government. As pointed out in the *Western Pacific* petition (pp. 16-18), while we believe that assumption to be incorrect, for present purposes it is unnecessary to challenge it.

Pontiac and Newport News. For plainly no concession was made that the domestic rate was reasonable as applied to the shipments here involved. To the contrary, as is borne out by the motion for referral to the Commission (R. 23), the Government's uniform position below was this: it is unreasonable to charge the domestic rate on traffic which is destined for exportation at the time of rail movement, when the freight is not in fact exported from the consignment port solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port.¹⁰

Stated otherwise, while the ultimate disposition of the litigation may have been dependent upon a determination respecting which of two rates was to be applied, as the issue was framed in the District Court this determination in turn hinged upon considerations of reasonableness rather than

¹⁰ It should be observed that the Court of Appeals' opinion in the earlier case (*United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213, App., *infra*, pp. 33-39) dispels any doubt that the Court of Appeals correctly understood the Government's position. The court there stated (215 F. 2d at 216, App. 38): "The government contends that the court below should have stayed the proceedings and referred the case to the Interstate Commerce Commission for an adjudication of the reasonableness of the domestic rate as applied to these shipments * * *." [Emphasis supplied.] It might also be noted that, while on the earlier appeal the Government suggested, without pressing the point, that as a matter of tariff construction the export rate was applicable, in this case it expressly disclaimed any reliance whatever upon the terms of the export tariff itself.

upon a construction of the terms of the respective tariffs. And, contrary to the seeming belief of the court below, whether examined from the standpoint of the prohibition against unreasonable charges contained in Section 1 (5) of the Interstate Commerce Act (App., *infra*, p. 19), or of the prohibition against unreasonable practices set forth in Section 1 (6) (App., *infra*, pp. 19-20), the matter is one within the exclusive province of the Commission. As this Court observed in *Great Northern Ry Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291, "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." Cf. *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, 196; *Mitchell Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 247, 255-261; *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134, 147; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 432.

That questions of reasonableness such as the one presented here necessitate Commission resolution has been recognized by several lower courts. In *Reconstruction Finance Corporation v. Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C. A. 9), for example, the issue was which of two tariff rates applied to certain shipments of tax-free Government alcohol. While the shipper did not contend that the rate charged by the carrier was unreasonable *per se*, its expert witnesses sug-

gested that, because of the character of the shipments, the carrier could not collect that rate on their movement without contravening the reasonableness provisions of the governing Act. The Ninth Circuit refused to consider this suggestion, holding on the authority of *Pennsylvania R. R. Co. v. International Coal Mining Co.*, *supra*, that it must be addressed to the Commission (170 F. 2d at 98). See, also, to the same effect *Union Pacific Ry. Co. v. United States*, 125 C. Cls. 390, 394, discussed in the petition in *United States v. Western Pacific Ry. Co.* at pp. 12-13.

There certainly can be no doubt regarding the position of the Commission itself. On at least five occasions since the beginning of World War II that body has been called upon by shippers to determine whether the domestic rate may be applied in situations where exportation from the consignment port has not taken place, or some other condition precedent set forth in the established export tariff had not been met, because of intervening war conditions. *C. B. Fox Co. v. Gulf, Mobile & Ohio Ry. Co.*, 246 I. C. C. 561; *River Petroleum Corp. v. Yazoo & M. V. R. Co.*, 258 I. C. C. 1; *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I. C. C. 422; *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, 263 I. C. C. 760; *General Carloading Co., Inc. v. Baltimore & Ohio R. Co.*, 266 I. C. C. 243. And, in each instance, it held that in the circumstances the application of the domestic rate was unjust and

unreasonable and, on that holding, awarded reparations. As the Commission put it in *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, *supra*, citing its earlier *Fox* and *Mid-Continent Petroleum* decisions (263 I. C. C. at 763):

Complainant made the shipments under consideration in good faith, with the understanding that the export rate would be protected. Exportation of the shipments through the port of New York, as originally intended, was prevented by extraordinary conditions caused by the war, conditions clearly beyond the control of the parties. Moreover, the subsequently published tariff provisions, which permit the application of export rates to similar shipments, are entitled to consideration, although they may not be applied retroactively. In view of these circumstances, we are of the opinion that *application of the domestic rates on these shipments would be unreasonable*. [Emphasis supplied.] ¹¹

¹¹ As heretofore noted, we urged below that, in respect to their operative facts, these decisions are indistinguishable from the instant case and, further, that where the Commission has already ruled on the reasonableness of a rate in given circumstances a court need not call upon it to reiterate the ruling. Cf. *Phillips v. Grand Trunk Ry. Co.*, 236 U. S. 662, 665. But, while we think that the court below misread the Commission holdings, we nevertheless do not ask this Court to pass upon their meaning. Instead, our point in this Court is that, whether it was right or wrong in its belief that the Commission had not resolved the precise issue raised here in the shipper's favor, the court below should not have undertaken itself to resolve it. We emphasize again that, what-

CONCLUSION

For the reasons above stated and those set forth in the petition in *United States v. Western Pacific R. Co.*, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

MELVIN RICHTER,
ALAN S. ROSENTHAL,
Attorneys.

DECEMBER 1955.

ever else may be said of the Commission decisions, they treat, correctly we think, the question of which rate applies to "frustrated" export traffic as being ~~one involving~~ considerations of reasonableness alone.

APPENDIX A

The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 *et seq.*, are as follows:

Section 1 (5) [49 U. S. C. 1 (5)]:

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Section 1 (6) [49 U. S. C. 1 (6)]:

It is made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess bag-

gage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 16 (3) [49 U. S. C. 16 (3)]:

(a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * * *

APPENDIX B

I. OPINION OF THE COURT OF APPEALS

United States Court of Appeals for the Fourth
Circuit

No. 6998.

UNITED STATES OF AMERICA, APPELLANT

versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, AT
RICHMOND

(Argued June 15, 1955. Decided July 14, 1955)

Before PARKER, *Chief Judge*, and SOPER and
DOBIE, *Circuit Judges*

Alan S. Rosenthal, Attorney, Department of Justice (Warren E. Burger, Assistant Attorney General; L. S. Parsons, Jr., U. S. Attorney, and Melvin Richter, Attorney, Department of Justice, on brief), for Appellant, and Meade T. Spicer, Jr. (Walter Leake on brief), for Appellee

PER CURIAM:

This is another case, like *United States v. Chesapeake & Ohio R. Co.*, 4 Cir. 215 F. 2d 213,

where the only question involved is whether the export or the domestic freight rate is properly applicable to a shipment where there was an intention to export at the point of origin but where this intention was abandoned when the shipment reached the port from which exportation was to be made, so that what started out as a shipment for export was converted by the shipper into a domestic shipment. The only difference between this and the former case is that here the goods, after being held at Newport News for more than three months, were shipped by rail to storage centers in Pennsylvania and New Jersey, and, after being held there for more than a year, were shipped across the continent to Wilmington, California, whence they were exported to Calcutta, India. It appears; here, just as clearly as in the former case, that the intention to export to China was abandoned and that the movement which began at Pontiac, Michigan, as an export was converted by the shipper into a domestic shipment. The case, we think, is clearly governed by our former decision and nothing need be added to what was there said.

Appellant insists that there is a difference with respect to its motion to stay proceedings and refer the case to the Interstate Commerce Commission, in that that motion was made in the court below in this case but not in the former one. It is clear, however, that the motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide.

There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain.

2. JUDGMENT

United States Court of Appeals for the Fourth
Circuit

No. 6998

UNITED STATES OF AMERICA, APPELLANT

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Filed and entered July 14, 1955.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judg-

ment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

(S) JOHN J. PARKER,
Chief Judge, Fourth Circuit.

(S) MORRIS A. SOPER,
United States Circuit Judge.

(S). ARMISTEAD M. DOBIE,
United States Circuit Judge.

3. ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Supreme Court of the United States

No. —, October Term, 1955

UNITED STATES OF AMERICA, PETITIONER
v.

CHESAPEAKE & OHIO RAILWAY COMPANY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 11, 1955.

(S) EARL WARREN,
Chief Justice of the United States.

Dated this 7th day of October 1955.

4. FINDINGS OF FACT AND CONCLUSIONS OF LAW, IN
CIVIL ACTION No. 1268, *Chesapeake & Ohio
Ry Co. v. United States*

FINDINGS OF FACT

1. The plaintiff is a corporation organized and existing under the laws of the State of Virginia and is a common carrier by railroad, operating in inter-state commerce, and connects with, and performs through services in conjunction with, other such common carriers by railroad who participated in the through transportation services involved in this case.

2. Thirty (30) carloads of chassis, seat cabs, and bodies were shipped from the Yellow Truck and Coach Manufacturing Company, Pontiac, Michigan, consigned to China Defense Supplies, Inc., Chesapeake and Ohio Terminal, Newport News, Virginia, a North Atlantic Seaboard Port of Export, between December 10, 1941, and January 9, 1942, inclusive, on the following numbered Government Bills of Lading on which transportation charges have been paid by the United States in the amounts shown:

Government bill of lading	Date of shipment	Transportation date of arrival at Newport News	Charges paid
WQ-4495005.....	Dec. 10, 1941	Dec. 18, 1941	\$1,979.62
WQ-4498594.....	Dec. 22, 1941	Dec. 27, 1941	1,939.77
WQ-4498596.....	Dec. 22, 1941	Dec. 27, 1941	1,182.23
WQ-4501687.....	Jan. 9, 1942	Jan. 12, 1942	799.41
Total charges paid.....			5,901.03

3. These Government Bills of Lading contain the words "Military D. A." and the words "For

Export D. A." and further show that the shipping cases were marked with the initials "C. D. S." (an abbreviation for China Defense Supplies, Inc.), followed by the word "RANGOON." As indicated by these annotations on the Bills of Lading, these shipments were authorized by the War Department; the property shipped was military property of the United States, moving for a military use, and intended for export pursuant to the provisions of the Lend-Lease Act of March 11, 1941 (22 U. S. C. 411 et seq.), for use by the Republic of China and it was intended by the Government that the property would be forwarded from the port of Newport News, Virginia, in ocean vessels to the Republic of China via the port of Rangoon, Burma, China Defense Supplies, Inc., was an American corporation organized, controlled and operated by the Government of China. It acted as the representative of the Government of China for the acquisition of military supplies from the United States pursuant to the Lend-Lease Act.

4. Three of these Government Bills of Lading contained the symbol "Rel. No. 50092, dated 11-26-41"; the fourth Bill of Lading contained the symbol "Rel. No. 50649, AM, dated 12-20-41." At the time the releases referred to in these Bills of Lading were issued, the Chief of Transportation of the War Department, in cooperation with the Maritime Commission, was administering a system for the supervision of export shipments of military supplies to facilitate their movement, through coordination of domestic transportation to ports and overseas transportation from such ports. Transportation officers of the War Department were not permitted to issue bills of

lading without first obtaining releases covering particular shipments, and such releases were issued so as to limit the tonnage scheduled to a particular port at a given time to the capacity of that port for prompt shipment. Pursuant to the Act of June 6, 1941 (55 Stat. 242), Executive Order No. 8771, dated June 6, 1941 (6 F. R. 2759), and the Act of July 14, 1941 (55 Stat. 591), the Maritime Commission requisitioned the title, use, or possession of foreign Merchant vessels in American waters and operated such vessels, either directly or by agent; chartered all American vessels and operated them or caused them to be operated with primary consideration to the needs of national defense; and granted priorities with respect to loading, fueling, and repairing of American vessels in the interest of the transportation of materials requested by defense agencies and materials deemed essential to the defense of the United States.

5. The references on these Bills of Lading to such releases indicate that arrangements had been made, pursuant to War Department Q. M. C. Circular No. 182, dated August 28, 1941, under the supervision of the Chief of Transportation of the War Department for the co-ordinated movement of this property from point of origin to the port of Newport News, Virginia, and for export there to Rangoon in ocean vessels.

6. By Executive Order No. 8989, dated December 18, 1941 (6 F. R. 6725), the President established the Office of Defense Transportation with the function of co-ordinating the transportation policies and activities of Federal agencies and private transportation groups in effecting such

adjustments in the domestic transportation systems of the Nation as the successful prosecution of the war might require, and directed the Office of Defense Transportation, in cooperation with the United States Maritime Commission and other appropriate agencies, to co-ordinate domestic traffic movements with ocean shipping in order to avoid terminal congestion at port areas and to maintain a maximum flow of traffic.

7. By Executive Order No. 9054, dated February 7, 1942 (7 F. R. 837), the President established the War Shipping Administration; transferred to it the functions of the Maritime Commission set forth in Paragraph 4 above; vested in it the functions of controlling the operation, charter, requisition, and use of all ocean vessels under the flag and control of the United States except combatant vessels and inter-coastal and inland transportation; the allocation of such vessels for use by the Army, Navy, other Federal Departments and agencies, and the Governments of the United Nations; and of collaborating with agencies of the Government which performed wartime functions connected with transportation overseas, in order to secure the most effective utilization of shipping in the prosecution of the war. This Executive Order provided that vessels under the control of the War Shipping Administration should constitute a pool to be allocated by the Administrator of the War Shipping Administration for use by the Army, Navy, other Federal agencies, and the Governments of the United Nations in compliance with strategic military requirements.

8. Upon the arrival of the property covered by these Government Bills of Lading at Newport News, Virginia, delivery thereof was made to the consignee, who caused the property to be unloaded from the railroad cars in which the property was transported. The property received in six of the cars covered by the said Government Bills of Lading was thereafter exported as intended at various times prior to March 8, 1942, but the property received in twenty-four of the said thirty cars was still on hand at Newport News, Virginia, on March 8, 1942, on which date the port of Rangoon, Burma, was captured by the Japanese. On that date, all available routes whereby the property in question could at that time be forwarded so as to reach the intended destination in China were cut off by the Japanese. Consequently, the property then on hand at Newport News, Virginia, was subsequently ordered loaded and shipped to storage centers maintained by the War Department at New Cumberland, Pennsylvania, or at Bloomfield, New Jersey. This property was not exported and there is no proof to show that any further effort was made to export it.

9. The plaintiff, as the delivering carrier at Newport News, Virginia, rendered bills for the line-haul transportation charges from Pontiac, Michigan, to Newport News, Virginia, and for the unloading and loading services performed at Newport News, Virginia, and was paid initially by an Army disbursing officer in substantially the amounts billed. There is no dispute with respect to the unloading and loading charges included in the said payments to the Plaintiff. The

line-haul transportation charges so paid to the plaintiff were computed by the use of the established domestic rates published in Central Freight Tariff No. 490-A, Agent B. T. Jones' I. C. C. No. 2767, for the property shipped in the twenty-four (24) cars that was not exported as intended, and at the established export rates published in Central Freight Association Freight Tariff No. 218-M, Agent B. T. Jones' I. C. C. No. 3432 for the property shipped in the six cars that was actually exported as intended. Upon audit of the payment vouchers the defendant thereafter computed the charges on all of the property shipped on the aforesaid Government Bills of Lading at the established export rates published in Tariff No. 218-M, and recovered the differences between the two sums by deductions from amounts otherwise due the plaintiff for other and different transportation services performed for the defendant.

10. It is agreed by the parties that the plaintiff has been fully paid for the services performed in connection with the portion of the property shipped that was actually exported from Newport News, Virginia.

11. If actual exportation of the articles shipped be not required as a condition upon which the export freight rates may be applied, the plaintiff has been paid in full for the transportation services performed.

12: It is agreed by the parties that if the domestic freight rates between Pontiac, Michigan, and Newport News, Virginia, are properly applicable to the portions of the property not exported, the aggregate amount of the transportation

charges now unpaid and owing by the defendant to the plaintiff is \$2,671.43.

CONCLUSIONS OF LAW

1. At the time the shipments involved herein were made, the Interstate Commerce Commission had determined certain published rates for the transportation of the articles involved, from Pontiac, Michigan, to Newport News, Virginia, to be reasonable in amount, commonly known as "domestic rates." By reason of such action of the Commission, these rates are conclusively presumed to be reasonable so far as concerns this Court. The Commission had also fixed certain other lower rates for the transportation for exportation, of the same articles between the same points, with certain safeguards to insure that actual exportation is carried out. For like reason, those rates are also conclusively presumed to be reasonable as to amounts and as to the stated conditions upon which they are to be applied. The articles involved herein were not exported, but were shipped to other domestic storage points. They never acquired an export status. Hence the export rates cannot be applied.

2. The fact that the shipper of the articles involved, at the time the shipments were made, intended in good faith that they be exported to Rangoon, Burma, for ultimate delivery to the Republic of China, and that such exportation may have been prevented or delayed by the fall of Rangoon to the Japanese Army, on March 8, 1942, is not a controlling factor, and does not, under the governing tariffs, make the export rates applicable. Under the circumstances shown the

domestic rates are applicable and must be enforced by this Court.

(S) STERLING HUTCHESON,
United States District Judge.

Date: February 12, 1954.

* * * * *

5. OPINION OF THE COURT OF APPEALS IN *United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213

United States Court of Appeals for the Fourth
Circuit
No. 6808

UNITED STATES OF AMERICA, APPELLANT
versus

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND

(Argued June 16, 1954. Decided Aug. 14, 1954)

Before PARKER, *Chief Judge*, and DOBIE, *Circuit Judge*, and TIMMERMAN, *District Judge*

Alan S. Rosenthal; Attorney, Department of Justice, (Warren E. Burger, Assistant Attorney General; L. S. Parsons, Jr., U. S. Attorney, and Melvin Richter, Attorney, Department of Justice, on brief) for Appellant, and Meade T. Spicer, Jr., (Walter Leake on brief) for Appellee

PARKER, *Chief Judge.*

This is an appeal from a judgment in the sum of \$2,671.43 in favor of the Chesapeake and Ohio

Railway Company in a suit against the United States under the Tucker Act, 28 U. S. C. A. § 1346, to recover the difference between the domestic freight rate and the export rate on certain shipments of automobile parts made from Pontiac, Michigan, to Newport News, Virginia, between December 10, 1941 and January 9, 1942. The shipments in question consisted of twenty-four carloads of chassis, seat cabs and bodies. They were shipped on government bills of lading which showed that they were intended for export to China by way of Rangoon, Burma. The shipments were made in good faith with the intention that they would be exported, releases for that purpose were properly obtained, and, but for the fall of Rangoon to the Japanese, they would have been exported on one of the vessels comprising the pool which the government was using in the transportation of lend-lease commodities. They were allowed to remain in Newport News, however, until after the fall of Rangoon, when it became impossible to transport them to China by way of that port. The government thereupon had them shipped to storage centers in the United States; and there is no showing that they were exported or that any further effort was made to export them. The railroad company billed the government for the domestic tariff rate on the shipments, which was duly paid. Later, in the year 1945, the general accounting office exercised the statutory right, 49 U. S. C. A. § 66, to deduct from other amounts due the railroad by the government the difference between the domestic tariff rate and the export tariff rate, which was lower; and this ac-

tion was instituted to recover the amount of this deduction.

The tariff rates filed by the railroad with the Interstate Commerce Commission provide a lower rate for export shipments than for domestic shipments, but only for export shipments which do not leave the possession of the carrier until delivered to the vessel which is to transport them or on which proof of exportation is given. Provision 23,030 of Central Freight Tariff No. 218-M, which is on file with the Interstate Commerce Commission and applies to the shipments in question is as follows:

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates; and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The question in the case is whether the domestic rate or the export rate applies to the shipments in question. The District Judge held that the good faith intention of the government, at the time the shipments were started, was not a controlling factor; that the fact that there was in effect and on file with the Interstate Commerce

Commission, a certain rate for the transportation for purely domestic shipments moving from Pontiac, Michigan, to Newport News, Virginia, and another rate for export shipments initially moving between those two points, "determined" the reasonableness of both rates; that the tariff requirement for actual proof of exportation for application of the export rate, was a reasonable safeguard "to insure that actual exportation is carried out," and that the shipments involved in this case did not ever acquire or reach export status. With respect to the lack of evidence of any effort to export the shipments, the judge said:

* * * there is no showing here that the government made any effort to ship these pieces of equipment anywhere except to Rangoon, and, in fact, made no effort to ship them to Rangoon, so far as the record shows. It is not in evidence in this case, but I think the court can take judicial notice that at the time lend-lease material of nearly every conceivable description, from cod liver oil and orange juice to mining equipment and railroad rolling stock, were being shipped to forty-odd nations of the world. I think I can take judicial notice of that fact because of the record of another case in this court. And no effort was made here to ship this equipment anywhere abroad and it was simply sent into storage.

We think the trial judge was clearly correct in holding that the domestic rate and not the export rate was the one here applicable. Unquestionably there was an intention to export the goods to China when the goods moved from Pontiac, Michigan; but it is equally clear that this intention

was abandoned after the fall of Rangoon and that what began as a movement in foreign commerce was converted into one which ended in this country and to which the domestic rates applied. We do not mean to say that the export rates would not apply if there had been a frustration of the enterprise from matters beyond the control of the shipper, as would be the case if the goods had been destroyed or seized by the public enemy before exportation. Here, however, the government was exporting goods of the sort involved to countries all over the world, and the fall of Rangoon did not prevent exportation to countries other than China. When the government voluntarily converted what had started out as an export shipment into a domestic shipment, there is no reason why it should not pay the domestic rate.

The government relies upon decisions of the Interstate Commerce Commission, of which *C. B. Fox Co. v. Gulf, Mobile and Ohio R. Co.*, 246 I. C. C. 561 and *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, 263 I. C. C. 760, are typical, holding in reparation proceedings that the domestic rate should be held unreasonable and the export rate applied where because of conditions over which the shipper has no control the attempt to export the goods was frustrated. In those cases, however, it appeared that the shipper's ability to export the commodities was completely ended¹ by causes over which it had no control, not, as here, that the shipper abandoned the intention to export

¹ In the *Products-From-Sweden* case the goods were eventually exported.

because one export channel was closed, when others were open, and thus voluntarily converted a movement which had begun as one for the export of goods to one in domestic commerce. Furthermore, while the Interstate Commerce Commission may pass upon the reasonableness of rates, the courts may not do so, but must apply the rates which the Commission has approved. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 33 S. Ct. 916, 57 L. Ed. 1472; *Baldwin v. Scott County Milling Co.*, 307 U. S. 478, 481, 59 S. Ct. 943, 83 L. Ed. 1409. The question here, as in the court below, is not the reasonableness of the rates, but which rate is applicable to the shipment.

The government contends that the court below should have stayed the proceedings and referred the case to the Interstate Commerce Commission for an adjudication of the reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing. It is a sufficient answer to this that no such action was asked of the court below but that, on the contrary, the stipulation of counsel on which the case was heard provided for judgment in accordance with a finding by the court as to whether proof of actual exportation was or was not required as a condition to the applicability of the export rate. "The rule is well settled that only in exceptional cases will questions, of whatever nature, not raised and properly preserved for review in the trial court, be noticed on appeal." *Hutchinson v. Fidelity Inv. Ass'n*, 4 Cir., 106 F. 2d 431, 436;

Blair v. Oesterlein Machine Co., 275 U. S. 220, 225, 48 S. Ct. 87, 72 L. Ed. 249; 3 Am. Jur., p. 25 et seq. The contention is without merit in any event. Whether the District Court would have stayed proceedings to the end that the question of reasonableness of rates might be passed upon by the Commission would have been a matter resting in its sound discretion and no court would reasonably have exercised the discretion when both parties were barred by limitations from asking the Commission for relief. Furthermore, if the matter could be brought before the Commission, there is no ground for thinking that the Commission would have held the domestic rate unreasonable and the export rate reasonable when the government could have exported the commodities to countries other than China and, instead of doing so, voluntarily converted an export into a domestic shipment.²

² See *Hanlon-Buchanan v. Burlington Rock Island R. Co.*, 258 I. C. C. 519, affirmed, 263 I. C. C. 603; *California Texas Oil Co. v. Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chemical & Fertilizer Co. v. Penn. R. Co.*, 268 I. C. C. 468; and *American Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605.

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AUG 23 1956

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, *Petitioner*

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

CASES:

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 19

UNITED STATES OF AMERICA, *Petitioner*

v.

THE CHESAPEAKE & OHIO RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The findings of fact, conclusions of law and order of the United States District Court for the Eastern District of Virginia are not reported (R. 26-27). The opinion of the Court of Appeals (R. 43-44) is reported at 224 F. 2d 443.

JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 1955 (R. 45). On October 7, 1955, the time for filing a petition for a writ of certiorari was

extended by the Chief Justice to and including December 11, 1955 (R. 45). The petition was filed on December 9, 1955, and was granted on January 23, 1956 (R. 46). 350 U.S. 953. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16(3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded the granting of the Government's motion for referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether a challenge to the reasonableness of a tariff rate, as applied in the prevailing circumstances, presents an administrative question calling for resolution by the Interstate Commerce Commission.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1, *et seq.* are set out in the Appendix, *infra*, pp. 17-19.

STATEMENT

This action was brought against the United States in the district court by respondent Chesapeake & Ohio Railway Company under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover sums

purportedly owing it in connection with the transportation of certain Government property (R. 1). The pertinent facts are undisputed and may be summarized as follows:¹

Between December 10, 1941, and January 31, 1942, the United States shipped from Pontiac, Michigan, under Government bills of lading, fifty carloads of chassis, seat cabs, and bodies (R. 23). The freight was consigned to China Defense Supplies, Inc.² at Newport News, Virginia (R. 19, 23). Notations on each of the bills of lading indicated that the shipments were authorized by the War Department, and that the goods involved were the military property of the United States, were moving for a military use, and were intended for exportation to the Republic of China pursuant to the provisions of the Lend Lease Act of March 11, 1941, 55 Stat. 31; 22 U.S.C. 411 *et seq.* (R. 24; Pet. App. 26-17). It was the bona fide intent of the Government to forward the property from Newport News, in ocean vessels, to the Republic of China via the port of Rangoon, Burma (R. 23-24).

Each of the bills of lading also contained symbols indicating that releases had been obtained on the cov-

¹ In part, these undisputed facts appear in the findings of the same district judge in an earlier companion action involving shipments made under almost identical circumstances. See pp. 6-8, *infra*. These findings are set forth in the Appendix to the Government's petition for certiorari in this case at pp. 26-32 (referred to as "(Pet. App.)").

² China Defense Supplies was an American corporation which acted as the representative of the Chinese government for the acquisition of military supplies from the United States under the Lend Lease Act (Pet. App. 27).

ered shipments (Pet. App. 27). The Chief of Transportation of the War Department, in cooperation with the Maritime Commission, supervised a system for facilitating export shipments of military supplies; this was done by coordinating domestic transportation to coastal ports with the overseas transportation from such ports (Pet. App. 27).³ The transportation officers of the War Department were not permitted to issue bills of lading without first obtaining a release covering the particular shipment, such release being issued with the view of limiting the tonnage scheduled to go to a particular port to the capacity of that port for prompt shipment (Pet. App. 27-28). The reference in each bill of lading here to a release indicated that arrangements had been made, prior to shipment, for

³ Pursuant to the Act of June 6, 1941, c. 174, 55 Stat. 242, as implemented by Executive Order 8771, June 6, 1941 (6 F.R. 2759), and the Act of July 14, 1941, c. 297, 55 Stat. 591, the Maritime Commission had requisitioned foreign merchant vessels in American waters and chartered all American vessels for operation consistent with the needs of national defense (Pet. App. 28). Priorities were issued with respect to the loading, fueling, and repairing of vessels on the basis of those needs (Pet. App. 28). Subsequently, the Office of Defense Transportation was created to direct and coordinate transportation activities with a view to obtaining maximum utilization of existing facilities. Executive Order 8989, December 18, 1941 (6 F.R. 6725; Pet. App. 28). On February 7, 1942, by Executive Order 9054 (7 F.R. 837), the War Shipping Administration was created, and the functions of the Maritime Commission in respect to the operation, charter, and requisition of merchant vessels were transferred to it (Pet. App. 29). The Executive Order specifically provided that the vessels under WSA control were to constitute a pool to be allocated by the Administrator for use by the Army, Navy, other federal agencies, and the Governments of the Allied Nations, in compliance with strategic military requirements (Pet. App. 29).

the coordinated movement of the goods from Pontiac, Michigan, to Newport News and for export thereafter from Newport News to China, via Rangoon (Pet. App. 28).

Upon the arrival of the goods covered by the bills of lading at Newport News, delivery was made to the consignee and the goods were unloaded onto a Government-controlled pier (R. 23). On March 8, 1942, the port of Rangoon fell to the Japanese military forces (R. 24). This cut off all available routes for exportation of the goods from the United States to China (Pet. App. 30). As a result, the intended exportation could not be consummated and the carloads were reshipped to storage centers maintained by the War Department (R. 19-20, 24).

The carrier submitted bills for its transportation services from Pontiac to Newport News based upon the established *domestic* rate published in Central Freight Association, Freight Tariff No. 490-A (R. 24). These bills were paid (R. 24). However, upon the subsequent audit of the payment vouchers by the General Accounting Office, the charges were recomputed at the lower *export* rate published in Central Freight Association, Freight Tariff No. 218-M, I.C.C. No. 3422 (R. 24). The Government thereafter recovered the difference between the two sums by deducting it from amounts due the carrier in connection with other transportation services performed by it (R. 24).⁴

⁴ This procedure is expressly authorized by Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66. See our brief in *United States v. Western Pacific Railroad*, No. 18, this Term, pp. 19-20, 40-41.

On March 10, 1952, respondent brought this action in the district court to recover the amount of the deduction (R. 1). By stipulation, the proceedings were held in abeyance pending final judgment in Civil Action 1268, instituted by respondent on December 29, 1950 (R. 21). That action involved twenty-four carloads of similar automotive equipment shipped in December 1941 and January 1942 from Pontiac to Newport News for exportation to China via Rangoon (Pet. App. 26, 30-31). Like the shipments here involved, their intended exportation was frustrated by the Japanese occupation of Rangoon, whereupon the goods were reshipped to storage centers maintained by the War Department (Pet. App. 30). As here, respondent charged and collected the domestic rate and, after administrative set-off by the General Accounting Office based upon application of the export rate, brought suit (Pet. App. 30-31).

At the trial in Civil Action 1268, respondent advanced the theory that the export rate applied solely in circumstances where exportation actually took place from the consignment port. In support of this theory, it relied exclusively on the literal language of Item No. 23030 of Tariff No. 218-M, which read (R. 42):

**APPLICATION OF EXPORT RATES TO NORTH
ATLANTIC SEABOARD PORTS OF EXPORT**

The rates named in this tariff, or as same may be amended, and designated as "Export Rates" will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the

port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of export rates, and also on traffic delivered to the party entitled to receive it at the carrier's seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given.

The Government's position in No. 1268 was that, whether this Item 23030 rendered the domestic rate applicable as a matter of tariff construction or not, the Interstate Commerce Commission had ruled, in virtually identical circumstances, that it would be unreasonable to apply the domestic rate, and that these rulings should be followed. The district court held, however, that, since there was no showing of actual exportation, the domestic rate was applicable and that the reasonableness of that rate was to be conclusively presumed (Pet. App. 32-33). Judgment was accordingly entered for respondent.

On appeal of that case, the Government renewed the position it took in the district court and urged, in the alternative, that if the lower court had been in doubt as to the applicability of the Commission's rulings relied upon by the Government, it should have stayed the proceeding *sua sponte* and referred the question of reasonableness to the Commission. The court of appeals rejected both contentions and affirmed the judgment. *United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213. Respecting the application of the tariffs, the court read the relevant Commission decisions as governing solely those situations

where, subsequent to the frustration of the intended exportation, the shipper made an effort to export the goods elsewhere. As to the matter of referral to the Commission "for an adjudication of the reasonableness of the domestic rate as applied to these shipments under the circumstances here appearing," the court held that the Government's failure to request the district court to take such action provided a "sufficient answer" (215 F. 2d at 216). It went on to suggest additionally that, since the Government's time for instituting an independent reparations proceeding before the Commission had run, the district court would have abused its discretion had it stayed the proceedings to enable the question of reasonableness to be presented to the Commission.

Subsequent to that decision of the court of appeals, a pre-trial conference was held in the case now here (R. 22). At that conference, the Government moved to refer to the Interstate Commerce Commission the question whether "the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported" (R. 22).⁵ In its pre-trial order, the court denied the motion and ruled that the issue to be litigated was whether the ultimate exportation of the shipments would render the export rate applicable (R. 22-23, 28). Holding in effect that such exportation was immaterial, the district court

⁵ In view of the stipulation and final judgment in Civil Action 1268 (R. 21; see p. 7, *supra*), the Government did not challenge the applicability of the domestic rate to those shipments which were not eventually exported.

later rejected an offer of proof that a substantial majority of the shipments involved had been transported from the War Department storage centers to California ports from which they were exported to India in June 1943 (R. 24, 27, 30, 42A). The court then awarded judgment to respondent in the amount of \$9,571.36 (R. 27, 41).

The court of appeals affirmed in a *per curiam* opinion (R. 43-44). In response to the Government's contention that, at the least, the Commission decisions relied upon established the unreasonableness of applying the domestic rate to those shipments encompassed by the offer of proof, the court held that the fact of subsequent exportation made no difference (R. 44). In relation to the motion for referral to the Commission, the court stated (R. 44):

[T]he motion was properly denied. The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the court was competent to decide. There were before the court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 8 Cir. 217 F. 2d 763, upon which appellant relies. Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings

which the Commission is without power to entertain.

SUMMARY OF ARGUMENT

I

As in the *Western Pacific* case (No. 18, this Term), the court below was of the view that the expiration of the two-year limitation period stated in Section 16(3) of the Interstate Commerce Act, while not barring the carrier's action against the United States, nevertheless deprived the Government of its right to have an issue of reasonableness referred to the Interstate Commerce Commission, concededly the only body empowered to pass on such an issue. This view is erroneous, we believe, for the reasons developed in our *Western Pacific* brief (pp. 12-27).

II

The court of appeals also erred in its holding that there were no questions before the district court which were administrative in character. The Government's consistent position throughout this litigation has been that it is unreasonable to charge the domestic, rather than the export, rate on traffic destined for overseas exportation, where the freight is not in fact exported from the original port of exportation solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port. "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 291. In numerous recent cases, indistinguishable on their facts,

the Commission has treated the question of the reasonableness of applying the domestic rate as one appropriate for its determination. And in circumstances analogous to those presented here, it has consistently ruled that the lower export rate must be applied.

ARGUMENT

I.

The Two-Year Limitation Period of Section 16(3) of the Interstate Commerce Act Does Not Bar Referral of the "Reasonableness" Question to the Interstate Commerce Commission.

Here, as in *Western Pacific* (No. 18, this Term), the court below was of the view that the expiration of the two-year limitation period, while not barring the carrier's action against the United States,⁶ nevertheless prevented a referral to the Interstate Commerce Commission of the question of the reasonableness of applying the domestic rates (R. 44). We believe that in so holding the court below erred. We respectfully refer the Court to our *Western Pacific* brief (pp. 12-27) for our argument on this aspect of the case.

⁶ All of the shipments in question were made in December 1941 and January 1942 (R. 3-7, 23). The carrier was paid promptly on the basis of the higher domestic rates (R. 24). On post-audit, however, the difference between that rate and the lower export rate was deducted from the amounts due the carrier on other transportation services (R. 24). All of these deductions were made no later than the summer of 1946 (R. 3, 16-18). Suit was filed by the carrier in the district court almost six years later, on March 10, 1952 (R. 1).

II.

The Government's Challenge to the Reasonableness of the Domestic Rate as Applied to the Present Shipments Raised an Administrative Question Calling for Resolution by the Interstate Commerce Commission.

Equally erroneous, we believe, is the further holding below that there were no questions before the district court calling for resolution by the Interstate Commerce Commission. Underlying this holding is the court's statement that the reasonableness of the domestic tariff rate was not in issue and that the sole question was whether that rate, or the lower export rate, was applicable (R. 44). By this, the court below apparently meant that the Government did not assert that the domestic rate was unreasonable *per se*, i.e., that it could not be lawfully applied in any circumstances to shipments of automotive parts moving between Pontiac and Newport News. For plainly no concession was made that the domestic rate was reasonable as applied to the shipments here involved. To the contrary, as is borne out by the motion for referral to the Commission (R. 22), the Government's uniform position below was this:—It is unreasonable to charge the domestic rate on traffic which is destined for exportation at the time of rail movement, when the freight is not in fact exported from the consignment port solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port.⁷

⁷ The court of appeals' opinion in the earlier case (*United States v. Chesapeake & Ohio Ry. Co.*, 215 F. 2d 213) dispels any doubt that the court correctly understood the Government's position. The court there stated (215 F. 2d at 216): "The government contends that the court below should have stayed the pro-

It is, of course, true that the ultimate disposition of the litigation is dependent upon a determination as to which of two rates is to be applied. But this determination hinges upon considerations of reasonableness rather than upon a construction of the terms of the respective tariffs. And, contrary to the seeming belief of the court below, whether examined from the standpoint of the prohibition against unreasonable charges contained in Section 1(5) of the Interstate Commerce Act (App., *infra*, p. 17), or of the prohibition against unreasonable practices set forth in Section 1(6) (App., *infra*, pp. 17-18), the matter is one within the exclusive province of the Commission. As this Court has observed, reiterating the rule in *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291, "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." See *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 196; *Mitchell Coal Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 255-261; *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 147; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 432.

In adhering to this settled rule, the lower courts consistently have recognized that questions of reasonableness, such as the one presented here, necessitate Commission resolution. Indeed, even in the *Western Pacific* case (No. 18, this Term), the Court of Claims,

ceedings and referred the case to the Interstate Commerce Commission for an adjudication of the reasonableness of the domestic rate as applied to these shipments * * *." [Emphasis added.]

while refusing to refer because of the expiration of the two-year period, fully recognized that the question of the reasonableness of applying particular rates was a matter appropriate for Commission determination and explicitly noted the "Government's right to have the reasonableness determined" by the Commission. 132 C. Cls. 115, 116. Similarly, in *Reconstruction Finance Corp. v. Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C.A. 9), the issue was which of two tariff rates applied to certain shipments of tax-free Government alcohol. While the shipper did not contend that the rate charged by the carrier was unreasonable *per se*, its expert witnesses suggested that, because of the character of the shipments, the carrier could not collect that rate on their movement without contravening the reasonableness provisions of the governing Act. The Ninth Circuit refused to consider this suggestion, holding on the authority of *Pennsylvania R.R. Co. v. International Coal Mining Co.*, *supra*, that it must be addressed to the Commission (170 F. 2d at 98). See, also, *Union Pacific Ry Co. v. United States*, 125 C. Cls. 390, 394.

There certainly can be no doubt that the Commission itself believes that questions of the precise kind involved here come within its special competence. On at least five occasions since the beginning of World War II, the Commission has exercised its jurisdiction to determine whether the domestic rate may be applied in situations where exportation from the consignment port has not taken place, or some other condition precedent set forth in the established export tariff had not been met, because of intervening war

conditions. *C. B. Fox Co. v. Gulf, Mobile & Ohio Ry. Co.*, 246 I.C.C. 561; *River Petroleum Corp. v. Yazoo & M. V. R. Co.*, 258 I.C.C. 1; *Mid-Continent Petroleum Corp. v. Illinois Central R. Co.*, 258 I.C.C. 422; *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, 263 I.C.C. 760; *General Carloading Co., Inc. v. Baltimore & Ohio R. Co.*, 266 I.C.C. 243. In each of the cited cases, the Commission held that the application of the domestic rate was unjust and unreasonable, and it awarded reparations. As the Commission put it in *Products-From-Sweden, Inc. v. Lehigh Valley R. Co.*, *supra*, citing its earlier *Fox* and *Mid-Continent Petroleum* decisions (263 I.C.C. at 763):

Complainant made the shipments under consideration in good faith, with the understanding that the export rate would be protected. Exportation of the shipments through the port of New York, as originally intended, was prevented by extraordinary conditions caused by the war, conditions clearly beyond the control of the parties. Moreover, the subsequently published tariff provisions, which permit the application of export rates to similar shipments, are entitled to consideration, although they may not be applied retroactively. In view of these circumstances, we are of the opinion that *application of the domestic rates on these shipments would be unreasonable.* [Emphasis added.]

We submit that the Commission's decisions are correct and that the question of which rate applies to "frustrated" export traffic is one involving considerations of reasonableness alone. It follows that the

courts below should not have determined that question but should have directed a referral to the Commission as the only body empowered to make such a determination.

CONCLUSION

For the reasons stated in this brief and in the Government's brief in *United States v. Western Pacific R. Co.* (No. 18, this Term), it is respectfully submitted that the judgment below should be reversed.

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AUGUST 1956

APPENDIX

The relevant provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 *et. seq.*, are as follows:

Section 1(5) [49 U.S.C. 1(5)]:

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * *

Section 1(6) [49 U.S.C. 1(6)]:

It is made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and

unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 16(3) [49 U.S.C. 16(3)]:

(a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

(b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time

such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * *

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In the
Supreme Court of the United States
October Term, 1953

No. ~~560~~ 19

UNITED STATES OF AMERICA,
Petitioner

v.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR THE CHESAPEAKE AND OHIO
RAILWAY COMPANY IN OPPOSITION

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~~In the~~
Supreme Court of the United States

October Term, 1955

No. 560

UNITED STATES OF AMERICA,
Petitioner

v.

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,**
Respondent

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

**BRIEF FOR THE CHESAPEAKE AND OHIO
RAILWAY COMPANY IN OPPOSITION**

**SUMMARY STATEMENT OF MATTER
INVOLVED**

This is an action for the recovery of balances of unpaid transportation charges on fifty government carload shipments moving by railroad from Pontiac, Michigan, to Newport News, Virginia, in the period between December 10, 1941, and January 31, 1942. The articles shipped were military supplies, and it was originally intended that they would be exported from Newport News in ocean vessels via the port of Rangoon, for delivery to the Republic of

China. However, they were unloaded and delivered at Newport News and remained there on government controlled piers. On March 8, 1942, the port of Rangoon fell to the Japanese military forces.

According to an offer of proof by the government in the form of a photostat worksheet or transcript of information from Department of Army records, tendered in evidence as "Exhibit 1", it was averred that on varying dates in May, 1942, the shipments were reloaded at Newport News onto railroad cars and consigned on new bills of lading to an inland government storage center, at Bloomfield, N. J.; that thereafter, on June 1st and 2nd, 1943, the articles shipped were reconsigned to another storage center at New Cumberland, Pa., and that later in that month, some portions of the original shipments were reconsigned to Wilmington, Calif., and other Pacific Coast points, from which they were exported to India on ocean vessels (Appellant's App'x. 41, 45; Appellee's App'x. 1-2).

Transportation charges on the movement from Pontiac to Newport News were assessed by the respondent in accordance with the applicable published domestic rate between those points, and were paid by the government. Later, upon audit, the General Accounting Office recomputed the charges upon this movement at the export rate, which was a lower rate. Enforcement of this lower rate was effected by deductions made several years later from other undisputed transportation bills rendered to the government (Account attached to Complaint). This aggregate sum of deductions is the amount for which recovery is sought herein.

This action was brought in March, 1952. In the meantime, a companion case between the same parties, involving charges between the same points and accruing under almost identical circumstances, was tried, and resulted in a judg-

ment for the plaintiff railway company, for charges calculated at the domestic tariff rate. That was the case docketed in the same District Court as No. 1268, and referred to as such in the petition. That case was appealed by the government to the Court of Appeals for the Fourth Circuit, and the judgment was affirmed by that Court on August 14, 1954, with a printed opinion which is reported as *United States v. The Chesapeake and Ohio R. Co.*, 215 F. 2d 213. No petition for writ of certiorari was filed in this Court. A Stipulation of Counsel had been previously filed in the instant case to the effect that the final judgment in No. 1268 "shall govern the disposition of the claims involved in this action to the extent that it is applicable." (Appellant's App'x. 37-38).

DISTRICT COURT PROCEEDINGS

At a pre-trial conference in the instant case held on December 9, 1954, government counsel presented an oral motion "to refer this case to the Interstate Commerce Commission to determine whether the domestic tariff rate involved in this proceeding is reasonable *if it should be determined that the shipment involved, or any part thereof, was subsequently exported.*" (Italics supplied). While this motion was denied, the Court in the same order specifically announced that "the question for determination * * * at the hearing of this case on its merits," would be "whether the ultimate exportation of the shipment, or any part thereof, results in causing the export tariff rate to Newport-News" to be applicable to whatever portions were shown to have been exported (Appellant's App'x. 39).

The case was heard in the District Court upon a Stipulation of Facts (Appellant's App'x. 40-42); to which were attached, the photostat worksheet "Exhibit 1," already

referred to, and pertinent pages of Tariff No. 218-M, "Exhibit A", showing the provisions governing the use of export rates, as well as upon the oral testimony of two witnesses tendered by the respondent and statements of counsel, as transcribed by the Court reporter (Petition 7, and Reporter's Transcript, Appellee's App'x. 3-20). The respondent filed a motion in writing, upon grounds stated, to reject and exclude the proof (Exhibit 1) tendered by the government in support of its contention that the export rate applied to such shipments or parts thereof, as may have been ultimately exported (Appellant's App'x. 42-43). For the purposes of this motion, it was assumed that the subsequent movements of the articles shipped were as indicated in Exhibit 1.

Demonstrating the scope and limits of the District Court's hearing and decision on the merits, are the following excerpts from pages of the Reporter's Transcript of Testimony (Appellee's App'x.):

[TR. PP. 1-3]

"THE COURT: So the only question for determination at this time is whether the ultimate exportation changes the tariffs as applied to the initial shipment to Newport News?

MR. SPICER: Yes, sir. We asked for charges from Pontiac, Michigan to Newport News, and the case is similar in every respect to the case tried before Your Honor, one of the cases in which there was a stipulation by Counsel that this was frustrated traffic. The position was taken that Your Honor had not passed on a situation where the goods were exported eventually.

THE COURT: After they left the possession of the carrier?

MR. SPICER: Yes. Our position is that this would not be sufficient to change the rate and make the exportation rate applicable.

MR. RYDER: We are now offering to prove the facts set forth in Exhibit 1. Those facts in this column show what happened to the goods shipped under the bill of lading referred to in this suit.

THE COURT: As I understand, the government is offering at this time to prove that certain portions of these shipments, after having been diverted from Newport News, and after having left the possession of the carrier, were ultimately exported from some other port?

MR. SPICER: Yes, and I prepared a motion in line to bring our objection to that proof. We are objecting to your receiving that evidence and ask that it be excluded from these papers. * * *

THE COURT: All right, gentlemen, I think I understand the questions. * * *

[TR. P. 20]

THE COURT: Do you have any evidence, Mr. Ryder?

MR. RYDER: Nothing beyond what we offered to prove, as set forth in Exhibit 1.

MR. SPICER: I would like to have the statement in the Record that there is no representative from the General Accounting Office of the government to make any explanation of the records, which made it necessary for me to call for the explanation in the evidence I have just presented. * * *

[TR. PP. 21-23]

THE COURT: You have nothing further for the Record?

MR. SPICER: No, sir.

THE COURT: Do you desire, Mr. Ryder, to be heard in opposition to this motion?

MR. RYDER: No, sir, except we do not agree to the motion and object to it.

THE COURT: You object to the motion?

MR. RYDER: Yes.

THE COURT: Gentlemen, as I understand from your statements and from the Stipulation and exhibits, as well as statement of the Counsel, the facts, briefly, are these:

The shipment involved was from Pontiac, Michigan, to Newport News, Virginia, destined for export to Rangoon. Upon arrival at the port of Newport News, the government, due to the fall of Rangoon, diverted, or caused to be diverted, this shipment which was re-shipped to other points in the United States. The goods left the possession of the carrier, the Chesapeake and Ohio Railway Company, without having been exported from Newport News, the Atlantic Seaboard port of proposed exportation. Subsequently, after the goods had left the possession of the carrier, the goods, or a part of them, were exported from other ports in the United States, but not from Newport News.

The question proposed is whether the export rate is applicable from Pontiac, Michigan, to Newport News, Virginia, and from the stipulations and exhibits and statements of Counsel, independently of the testimony which has been offered, it appears clear to me that the export rate does not apply under said circumstances from Pontiac, Michigan, to Newport News, Virginia; and therefore, proof of ultimate exportation from other ports, as indicated by Exhibit 1, would not change the applicable tariff, which should be the domestic rate from Pontiac, Michigan, to Newport News, Virginia. Therefore the motion of the Plaintiff to reject proof of ultimate exportation of the shipment will be granted, and the offer of the government, as set out in paragraph four of the Stipulation, will be denied.

Do you gentlemen have any comment concerning the procedure?

MR. RYDER: The only other thing, then, is to enter judgment order.

THE COURT: In the amount set forth?

MR. RYDER: Yes.

THE COURT: Could not an order be entered showing the Court's rejection of the proof?

MR. SPICER: Yes, and I have presented an order which reads that the Defendant, having no further defense to present, it is considered that the Plaintiff recover the amount as stated.

THE COURT: Do you have any contrary suggestion, Mr. Ryder?

MR. RYDER: I would like to suggest to the Court that the order be changed to read, in the third line, that the Defendant offered to present proof of the ultimate export in accordance with Exhibit 1, rather than a general statement such as this is.

MR. SPICER: I think that is proper. * * *

Hence, contrary to what is stated on page 1 of the petition, the Judge of the District Court did deliver an oral opinion briefly outlining the principal facts and applying the law, which was transcribed as a part of the record in that court.

The judgment order (Appellant's App'x. 43-44) in favor of the respondent, shows that it was predicated upon a sustaining of the motion to exclude the government's evidence as to ultimate exportation of the articles shipped, because such evidence was insufficient to make the export rate applicable. Tariff No. 218-M, Item 23030 (Petition 7), showed on its face that it only applied to "North Atlantic Seaboard ports of export," and only upon traffic delivered

by the rail carriers direct to export vessels or to piers at the ports for exportation and on which proof of actual exportation is furnished. There was no pretense on the part of the government that these provisions of this tariff had been actually complied with, or that the rate therein stated was "applicable as a matter of tariff construction." There was no explanation made of the delay involved in the several inland movements and no effort to show any continuity between them. Nor was there any attempt to show that the domestic rate assessed by the respondent was *per se* invalid or unreasonable.

The statements on page 11 of the petition "(2) that in any event the issue which the Government sought to refer was one to be determined judicially rather than administratively", and that "This holding conflicts with decisions of this Court and of other courts of appeals in an important area of judicial administration and, additionally, is at variance with the understanding and practice of the Commission as manifested by decisions of that agency * * *," are incorrect and without justification. The Court did not decide that the issue of reasonableness under Section 1 of the Interstate Commerce Act was to be determined by the courts. Also, there is no conflict in the decision with holdings of this or other courts or with the practice before the Interstate Commerce Commission.

An adequate summary of the material facts of the case appears in the *per curiam* opinion of the Court of Appeals, reported at 224 F. 2d 443, and the background facts are set out in greater detail in the earlier opinion delivered by Chief Judge Parker on behalf of the same Court, in the previous case, No. 1268, *United States v. Chesapeake and Ohio Railway Co.*, 215 F. 2d 213.

REASONS FOR DENYING WRIT OF CERTIORARI

Neither ground relied upon by the government on page 11 of its petition to justify a review by this Court is supported by the record of what occurred in the trial Court.

Both the orders entered in the instant case and the Reporter's Transcript of Testimony show that in the trial court the binding force of the final decision in case *No. 1268* was properly recognized as to all features of the case, except as to any portions of the shipments which might be shown to have been exported at some remote time. The Court clearly denied the motion to refer the case to the Commission *for lack of merit*, and without any mention or consideration of the two-year period of limitation found in Section 16(3) of the Interstate Commerce Act (49 U. S. C. § 16(3)(b)) by either counsel or court. There are, as a matter of fact, a number of cases in which the Commission has upheld the application of domestic rates to "frustrated" shipments, as not being unreasonable. See *Hanlon-Buchanan v. Burlington, R. I. R. Co.*, 258 I. C. C. 519, affirmed 263 I. C. C. 603; *California, Texas Oil Co. v. Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chem. & Fert. Co. v. Penn. R. Co.*, 268 I. C. C. 468, and *Amer. Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605.

As was aptly said by the Court of Appeals, in its opinion in this case, in 224 F. 2d 443, 444:

"The only question involved is whether the export or the domestic freight rate is properly applicable to a shipment where there was an intention to export at the point of origin but where this intention was abandoned when the shipment reached the port from which exportation was to be made, so that what started out as a shipment for export was converted by the shipper into a domestic shipment."

In neither court was the decision or outcome of the case dependent upon a ruling on the two-year statutory limitation.

It is interesting to observe as to the error now alleged, that as recently as May, 1954, the government's brief, prepared by almost the same group of counsel for the Court of Appeals for the Fourth Circuit, in case *No. 1268*, at page 26, contains the following admission as to a similar factual situation:

"By virtue of Section 16(3) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. 16(3), reparation proceedings must be brought within two years after the delivery or tender of delivery by the carrier. Cf. *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 226. The United States as well as private shippers is bound by that limitation."

The present action involved very simple facts. It was an ordinary proceeding to enforce payment of published transportation charges under a tariff provision which was neither ambiguous nor obscure. There was no challenge made to any of the specific terms of the tariff. The only defense at the trial was that the delayed exportation, although it occurred eighteen months subsequent to the original movement to Newport News, and also after the articles had completely left the respondent's possession, by means of three successive domestic reshipments and through ports not covered by the tariff at all, was still sufficient to authorize the export rate being applied to the original movement.

This was also noted by the Court of Appeals, in 224 F. 2d 443, 444:

"The question was not the reasonableness of rates,

which everyone conceded to be reasonable, but which rate was applicable to the shipment under the circumstances of the case, a question which the Court was competent to decide. There were before the Court no such administrative questions as were involved in *United States v. Kansas City Sou. R. Co.*, 217 F.2d 763, upon which appellant relies."

A like statement is found in the opinion of the same Court in case No. 1268, at 215 F. 2d 213.

The failure to show compliance with the export tariff requirements was so palpable as to present no real problem, either of fact or of tariff construction, and certainly no administrative problem. Hence, there was no need for the specialized or technical knowledge and qualifications of an administrative body.

This respondent further submits that in the trial court there was no general allegation made of unreasonableness with respect to the tariff rates involved. The sole argument there was, that it would be unreasonable to enforce the domestic rate on those articles which were eventually exported, regardless of whether such exportation was in due time and otherwise in accordance with the tariff requirements. As to those portions of the shipments not exported at all, the government was foreclosed from challenging the applicability of the domestic rate, by the terms of the stipulation of counsel, and the judgment entered in case No. 1268, as is recognized in a footnote at the bottom of page 9 of its petition.

To the statement made on page 14 of the petition that the government's "uniform position below" was: that it is unreasonable to charge the domestic rate on traffic which is prevented from being exported from the consignment port "solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port", it is sufficient

to say that the record fails to show that any such argument was presented by government counsel in the District Court in this case, probably because it was considered as precluded by the prior ruling to the contrary, in case No. 1268. In this connection, it is to be observed that none of the shipments were consigned from Pontiac until after the attack on Pearl Harbor had occurred. Nor was the fall of Rangoon a totally unexpected event.

The argument of the government, presented on pages 16 and 17 of its petition, that the Interstate Commerce Commission decisions in reparation proceedings cited (of which *C. B. Fox Co. v. Gulf, Mobile & O. R. Co.*, 246 I. C. C. 561, is typical), are either persuasive or binding authority in the present case, is effectively rebutted and overcome by that portion of the Court's opinion in case No. 1268 dealing with this subject, wherein it is pointed out that in that case the abandonment of intent to export was *voluntary*, and not due to conditions over which the shipper had no control, as was the situation in the decisions cited. Likewise, in the instant case, the government, through the War Shipping Administration, was shipping Lend Lease goods of all kinds to various parts of the world and a vast fleet of vessels was available for its purposes. If the military authorities, because of the fall of Rangoon, changed the destination of the articles involved herein for reasons of war strategy, this was not a risk which the carriers were obligated or expected to bear. In any event, the power of decision, as well as the legal consequences of such a change, would rest with the military authorities. The mere existence of war conditions did not *ipso facto* suspend or nullify existing legal relations between shippers and carriers. Certainly it was not possible for the shipper in this case to have an issue "framed", by a general plea of unreasonableness, several years after the transportation services have been rendered, and thereby

upset the enforcement of the legal freight rate. The petitioner seemingly concedes that its shipments did not qualify for the rate contended for, but seeks to offer a belated as well as vague excuse for non-compliance with the tariff, which has no evidential support.

CONCLUSION

It is earnestly submitted that the two decisions and judgments in the courts below were plainly right and were fully in accord with reason and legal authority. No novel questions of law were presented and there is no real conflict with rulings of other Federal Courts. To argue that the District Court was not competent to pass upon the uncomplicated set of facts presented and to apply the clear provisions of the appropriate tariff thereto, is to ignore the obvious and indulge in sophistry. The petition for writ of certiorari should therefore be denied.

To enable the Court to readily ascertain the issues presented in the trial court, an additional Respondent's Appendix to this brief is annexed hereto, incorporating several legal papers, including the trial court order of judgment, which were in the Appendix to the government's brief in the court below, but have not been reprinted by the petitioner to accompany its petition.

Respectfully submitted,

STROTHER HYNES
1500 First Natl. Bank Bldg.
Richmond, Virginia

MEADE T. SPICER, JR.
1103 Mutual Building
Richmond, Virginia

Counsel for Respondent

January 5, 1956.

1. STIPULATION OF COUNSEL

[Caption omitted]

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, as follows:

1. That some or all of the claims in this action present the same issues of law and fact as are presented by the case of *The Chesapeake and Ohio Ry. Co. v. United States*, in the District Court of the United States for the Eastern District of Virginia, Civil Action No. 1268.

2. That further proceedings in this action shall be stayed until there is a final judgment in No. 1268, *supra*.

3. That the final judgment in No. 1268, *supra*, shall govern the disposition of the claims involved in this action to the extent that it is applicable.

4. It is understood that the final judgment in No. 1268 refers to the judgment after all rights of appeal have been exhausted, if either party should determine to appeal from any judgment of the District Court in No. 1268.

Dated: _____

2 (S.) MEADE T. SPICER, JR.,
Counsel for Plaintiff.

(S.) A. CARTER WHITEHEAD,
United States Attorney.

(S.) RICHARD E. LEWIS,
Ass't. United States Attorney.

2. ORDER ON PRE-TRIAL CONFERENCE

[Caption omitted]

At a pre-trial conference with counsel held at Richmond on December 9, 1954, it was determined and is now ORDERED that:

(1) The motion of the defendant to refer this case to the Interstate Commerce Commission to determine whether the domestic tariff rate involved in this proceeding is reasonable if it should be determined that the shipment involved, or any part thereof, was subsequently exported, is denied.

(2) The question for determination by the Court at the hearing of this case on its merits is whether the ultimate exportation of the shipment, or any part thereof, results in causing the export tariff rate to Newport News applicable in the instant case for transportation of such shipment, or any part thereof, as may have been so exported.

(3) In so far as the related cases now pending will be affected thereby the decision of this case will be controlling.

(S.) STERLING HUTCHESON
United States District Judge.

December 10, 1954.

3. STIPULATION OF FACTS

[Caption omitted]

Now comes The Chesapeake and Ohio Railway Company, plaintiff, by and through its undersigned attorney of record, and the United States of America, defendant, by and through L. S. Parsons, Jr., United States Attorney for the Eastern District of Virginia, and hereby stipulate that the following facts are to be taken as true and correct in

this action, without prejudice to objections to materiality and relevancy; and under the best evidence rule.

1. The plaintiff is a corporation organized and existing under the laws of the State of Virginia and is a common carrier by railroad, operating in interstate commerce, and connects with, and performs through services in conjunction with, other such common carriers by railroad who participated in the through transportation services involved in this case.

2. This is an action under the Tucker Act for the collection of balances of transportation charges on various shipments transported by the plaintiff for the defendant. Included in the Account or Schedule of Charges annexed to the plaintiff's Bill of Complaint, are Line-haul Freight Charges which accrued on fifty carload shipments of Freight Chassis, Seat Cabs and Bodies, consigned and transported on government bills of lading from Pontiac, Michigan to Newport News, Virginia, on various dates in the period from December 10, 1941, through January 31, 1942, under applicable tariffs and classifications in effect, and delivered to the consignee at Newport News, Virginia, and unloaded on a pier controlled by the government.

3. The said shipments were made in good faith by the government, with the intention that the articles therein would be exported from Newport News to the Republic of China, pursuant to the Lend-Lease Act of March 11, 1941, by way of the port of Rangoon, Burma. Except for the fall of Rangoon to the Japanese military forces on March 8, 1942, the shipments would have been exported accordingly.

4. Defendant now offers to present evidence alleged to show the fact set forth in the attached photostat, Exhibit 1.

5. At the time the shipments were consigned and trans-

ported from Pontiac, Michigan, to Newport News, Virginia, there was on file with the Interstate Commerce Commission and in effect, Central Freight Tariff No. 218-M, attached hereto as Exhibit 2 to this Stipulation of Facts.

6. The plaintiff, as delivering carrier at Newport News, Virginia, rendered bills for the line-haul transportation charges from Pontiac, Michigan, to Newport News, and said bills were paid initially by Army disbursing officers in substantially the amounts billed; such charges being computed by the use of the established domestic freight rates published in Central Freight Tariff No. 490-A, on file with the Interstate Commerce Commission and in effect. Upon subsequent audit of the payment vouchers, the General Accounting Office of defendant several years thereafter, recovered back from the plaintiff, the difference between such sums and the lesser sums calculated respectively, by said office, at the existing export freight tariff rates, by making deductions from amounts otherwise due to the plaintiff by the defendant, on other bills for other and different transportation services performed, by virtue of Title 49 U. S. Code, Annotated, Section 66.

7. The question for determination is, whether the published domestic freight tariff rates between Pontiac, Michigan, and Newport News, Virginia, are properly applicable to the shipments involved, or whether the lower export tariff rates are applicable thereto.

8. The title page of said Central Freight Tariff No. 218-M, and pages 81, 331, 333, 334 and 362 thereof are attached hereto as "Exhibit A" to this Stipulation of Facts.

Agreed:

(S.) R. R. RYDER,

Assistant United States Attorney.

Agreed:

(S.) MEADE T. SPICER, JR.,

Counsel for Plaintiff.

Feb. 10, 1955.

4. PLAINTIFF'S MOTION TO REJECT PROOF
OFFERED BY DEFENDANT

[Caption omitted]

Plaintiff moves that the proof offered by defendant, in support of a contention that certain portions of some of the shipments on which charges are sought to be collected herein, were subject to an export rate from Pontiac, Michigan, to Newport News, Virginia, be rejected and excluded by the Court, upon the following grounds:

1. The ultimate alleged exportation of such shipments was not in compliance with the applicable published tariffs in effect, namely, Central Freight Tariff No. 218-M.

2. The defendant voluntarily converted the shipments into domestic shipments before they were ultimately exported.

3. The articles left the possession of the carrier and were transported to other domestic points, and were stored and reboxed by a private contractor at various storage places, prior to being exported.

4. The articles were not exported from Newport News, Virginia, but from Pacific Coast points, to which the tariffs in effect had no application.

5. The articles ultimately exported were not the identical articles as originally consigned from Pontiac, Michigan.

6. Exportation did not take place within any reasonable time after delivery at Newport News, Virginia, under the circumstances.

7. Defendant enjoyed other export rates from the Pacific Coast points to India.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

5. THE JUDGMENT ORDER
[In District Court]

[Caption omitted]

This day came the parties, by their respective attorneys, and filed a signed Stipulation of Facts. The defendant offered to present proof of the facts contained in Exhibit No. 1 attached to said Stipulation of Facts, and thereupon the plaintiff filed its motion in writing to reject and exclude the said proof offered by the defendant, and also presented oral testimony of witnesses in support of its Bill of Complaint and of its said motion;

Whereupon, the Court having maturely considered the Stipulation of Facts, and the pleadings and evidence, including the Exhibits and the oral testimony presented, and the arguments of counsel, and being of opinion that the plaintiff's motion to reject the proof tendered by the defendant should be sustained, doth sustain said motion and doth reject and exclude such proof:

No further evidence or defenses being presented, and the Court being of opinion that the plaintiff is entitled to recover for transportation charges in the amount set forth in the account attached to its Bill of Complaint, namely, \$9,657.69, subject to an admitted credit of \$86.33, *It Is Therefore Considered by the Court*, that the plaintiff do recover of the defendant, the United States, the sum of Nine Thousand Five Hundred and Seventy-One Dollars and Thirty-Six Cents (\$9,571.36).

(S.) STERLING HUTCHESON
United States District Judge.

Date: 2/10/55.

Office - Supreme Court, U.S.

FILED

SEP 24 1956

JOHN T. FEY, Clerk

In the
Supreme Court of the United States
October Term, 1956

No. 19

UNITED STATES OF AMERICA,

Petitioner

v.

**THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,**

Respondent

**On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

**BRIEF ON BEHALF OF THE CHESAPEAKE
AND OHIO RAILWAY COMPANY**

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1309 State-Planters Bank Bldg.
Richmond, Virginia
Counsel for Respondent

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**In the
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**On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit**

**BRIEF ON BEHALF OF THE CHESAPEAKE
AND OHIO RAILWAY COMPANY**

OPINIONS OF THE COURTS BELOW

The informal opinion rendered by the District Judge in deciding this case, as transcribed by the court reporter, is found at pages 40 to 41, inclusive, of the printed record. The judgment order of the District Court from which the appeal to the Court of Appeals for the Fourth Circuit was taken, is at pages 26 to 27 of the same record. The opinion of the Court of Appeals (R. 43-44) is reported at 224 F. 2d 443.

QUESTIONS PRESENTED

Since the "Questions Presented" for review are so inaccurately set forth in the Government's Briefs in relation to the District Court Proceedings, and since the Respondent desires to present an additional question which arose subsequent to the entry of judgment by the Court of Appeals, it is necessary that they be restated, as follows:

1. Whether the concurrent findings of the two courts below that the shipments involved were voluntarily converted by the Government from export shipments into domestic shipments after reaching Newport News, Virginia, warrant that the judgment be affirmed.

2. Whether the District Court erred in applying the domestic tariff rate to the transportation movement between Pontiac, Michigan and Newport News, Virginia, of such portions of the shipments as were not exported from Newport News but were reshipped from there to domestic storage points and were ultimately exported through Pacific Coast points.

3. Whether the District Court erred in refusing to order a reference to the Interstate Commerce Commission of the question of the reasonableness of the domestic tariff rate between Pontiac and Newport News, as applied to the above shipments.

4. Whether consideration of the two-year limitation period of Section 16(3)(b) of the Interstate Commerce Act was essential to the decision rendered in this case.

5. Whether the two-year limitation period of Section 16(3)(b) of the Interstate Commerce Act is jurisdictional and deprives the Interstate Commerce Commission of power to act upon any claim thereafter filed challenging the reasonableness of a rate.

STATEMENT OF THE CASE

This is an action brought by the Respondent for the recovery of balances of transportation charges on fifty (50) Government carload shipments of automotive equipment (chassis, seat cabs and bodies) moving by railroad from Pontiac, Michigan to Newport News, Virginia, in the period between December 10, 1941 and January 31, 1942. The articles shipped were military supplies. When originally consigned, it was intended that they would be exported from Newport News, in ocean vessels, via the Port of Rangoon, for delivery to the Republic of China. However, they were unloaded and delivered at Newport News and remained there on Government-controlled piers. On March 8, 1942, the port of Rangoon, Burma, fell to the invading Japanese military forces (Partial Stipulation of Facts, R. 23-24). Following this occurrence, no effort was made to export the articles involved from Newport News. In the month of May, 1942, practically all were reshipped by rail on new bills of lading to a Government storage center at Bloomfield, New Jersey, for "reworking and recrating" (Exhibit B to Complaint—Account, R. 19 and R. 38-39).

It was avowed from certain General Accounting Office work sheets, prepared from Army records, that a full year later, on June 1 and 2, 1943, the articles involved had been reconsigned to another storage center at New Cumberland, Pennsylvania, and that later in that month, some portions were sent to Wilmington, California and other Pacific Coast ports, from which they were exported to Calcutta, India (Exhibit 1, R. 24 and R. 42 A).

Transportation charges on the movement from Pontiac to Newport News were originally assessed by the Respondent in 1942, in accordance with the applicable published domestic tariff rate between those points and were paid by the

Government (R. 24). Four years later, in 1946, the General Accounting Office recomputed the charges upon this movement at the export rate, which was a lower rate. Enforcement of this lower rate was effected by subsequent deductions from other undisputed C. & O. freight bills rendered to the Government. See Exhibit "A" attached to the Complaint - Account (R. 2 and 18).

This action was brought in March, 1952. In the meantime, a companion case between the same parties, involving charges on similar articles transported between the same two domestic points and accruing under almost identical circumstances, was tried and resulted in a judgment for the Railway Company, for charges calculated at the higher domestic tariff rate. That was the case docketed in the same District Court as No. 1268 and referred to as such in the Government's brief. It was appealed by the Government to the Court of Appeals for the Fourth Circuit, and the judgment was affirmed by that Court on August 14, 1954, with opinion reported as *United States v. C. & O. R. Co.*, 215 F. 2d 213. No petition for writ of certiorari was filed in that case. A Stipulation of Counsel had been previously filed in the instant case to the effect that the final judgment in Case No. 1268 "shall govern the disposition of the claims involved in this action to the extent that it is applicable" (R. 21).

District Court Proceedings

In the trial of Case No. 1268, the Government made no effort to show what became of the articles shipped after they were reshipped from Newport News to War Department storage centers. In seeking to have the export rate applied, it relied upon its good faith intention to export the articles at the time the shipments were started, claiming that the

frustration of this purpose was due to unforeseen war conditions developing after the shipments reached Newport News. It contended that the domestic tariff rate would be unreasonable under the particular circumstances shown. These contentions were overruled by the District Court, as well as by the Court of Appeals, which held that the provisions of the export tariff had not been complied with.

At a pre-trial conference had in the instant case on December 9, 1954, after the Court of Appeals decision in Case No. 1268 had become final, the Government first averred that portions of the shipments involved had been ultimately exported through Pacific Coast points. It moved to refer to the Interstate Commerce Commission the question of whether the domestic tariff rate would be reasonable, "if it should be determined that the shipment involved; or any part thereof, was subsequently exported." In overruling this motion, the Court ruled that the issue to be determined at the trial on the merits, was whether any such ultimate exportation of the shipments or any part thereof as might be shown by evidence, would cause the lower export rate to apply (R. 22-23, 28).

On February 10, 1955, a trial was had in open court on a partial Stipulation of Facts (R. 23-24); certain tariff excerpts (Photostat Exhibit "A," R. 24 and R. 42), and the oral testimony of two witnesses presented by the plaintiff, one being a tariff expert to explain its provisions, and the other to verify the account figures (R. 27-41). At this trial, the Government presented no witnesses, but tendered certain work sheets prepared by the General Accounting Office from Army records, purporting to show several domestic movements of portions of the shipments, followed by ultimate exportation in June, 1943, from Pacific Coast ports to Calcutta.

This Respondent filed a motion in writing to reject and exclude the work sheet evidence of the Government, upon

the ground that the alleged exportation was not in compliance with the published export tariff; that the Government had voluntarily converted all of the shipments into domestic shipments at Newport News; that the articles had left the possession of the carrier and were transported to other domestic points, and stored and reboxed by a private contractor, prior to being exported; that the articles ultimately shipped abroad were not the same originally consigned; that exportation took place from ports to which the export tariff invoked had no application, and did not take place within any reasonable time after delivery at Newport News, and that on these very articles, the Government had since actually enjoyed other export rates through the Pacific Coast points to India in 1943 (R. 25). For the consideration of this motion only, it was agreed that the G A O work sheet data was to be taken as true.

The export tariff provision relied upon by the Government was Item No. 23030 of Tariff 218-M, on page 333, which reads as follows (Exhibit A, R. 24 and 42):

*"Application of Export Rates to North Atlantic
Seaboard Ports of Export*

The rates named in this tariff, or as same may be amended, and designated as 'Export Rates' will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given."

Demonstrating the scope and limits of the District Court's hearing and decision on the merits, are the following excerpts from the reporter's transcript of testimony and trial proceedings:

(R. 28-29):

"THE COURT: So the only question for determination at this time is whether the ultimate exportation changes the tariffs as applied to the initial shipment to Newport News?

"MR. SPICER: Yes, sir. We asked for charges from Pontiac, Michigan to Newport News, and the case is similar in every respect to the case tried before Your Honor, one of the cases in which there was a stipulation by Counsel that this was frustrated traffic. The position was taken that Your Honor had not passed on a situation where the goods were exported eventually.

"THE COURT: After they left the possession of the carrier?

"MR. SPICER: Yes. Our position is that this would not be sufficient to change the rate and make the exportation rate applicable.

"MR. RYDER: We are now offering to prove the facts set forth in Exhibit 1. Those facts in this column show what happened to the goods shipped under the bill of lading referred to in this suit.

"THE COURT: As I understand, the government is offering at this time to prove that certain portions of these shipments, after having been diverted from Newport News, and after having left the possession of the carrier, were ultimately exported from some other port?

"MR. SPICER: Yes, and I prepared a motion in line to bring our objection to that proof. We are objecting to your receiving that evidence and ask that it be excluded from these papers! * * *

"THE COURT: All right, gentlemen, I think I understand the questions."

* * *

(R. 40 and 41):

"THE COURT: Do you have any evidence, Mr. Ryder?"

"MR. RYDER: Nothing beyond what we offered to prove, as set forth in Exhibit 1.

"MR. SPICER: I would like to have the statement in the Record that there is no representative from the General Accounting Office of the government to make any explanation of the records, which made it necessary for me to call for the explanation in the evidence I have just presented."

* * *

"THE COURT: You have nothing further for the Record?"

"MR. SPICER: No, sir.

"THE COURT: Do you desire, Mr. Ryder, to be heard in opposition to this motion?"

"MR. RYDER: No, sir, except we do not agree to the motion and object to it.

"THE COURT: You object to the motion?"

"MR. RYDER: Yes.

"THE COURT: Gentlemen, as I understand from your statements and from the Stipulation and exhibits, as well as statement of the Counsel, the facts, briefly, are these:

"The shipment involved was from Pontiac, Michigan, to Newport News, Virginia, destined for export to Rangoon. Upon arrival at the port of Newport News, the government, due to the fall of Rangoon, diverted, or caused to be diverted, this shipment which was re-shipped to other points in the United States. The goods left the possession of the carrier, the Chesapeake and Ohio Railway Company, without having been exported

from Newport News, the Atlantic Seaboard port of proposed exportation. Subsequently, after the goods had left the possession of the carrier, the goods, or a part of them, were exported from other ports in the United States, but not from Newport News.

"The question proposed is whether the export rate is applicable from Pontiac, Michigan, to Newport News, Virginia, and from the stipulations and exhibits and statements of Counsel, independently of the testimony which has been offered, it appears clear to me that the export rate does not apply under said circumstances from Pontiac, Michigan, to Newport News, Virginia; and therefore, proof of ultimate exportation from other ports, as indicated by Exhibit 1, would not change the applicable tariff, which should be the domestic rate from Pontiac, Michigan, to Newport News, Virginia. Therefore the motion of the Plaintiff to reject proof of ultimate exportation of the shipment will be granted, and the offer of the government, as set out in paragraph four of the stipulation, will be denied.

"Do you gentlemen have any comment concerning the procedure?"

MR. RYDER: The only other thing, then, is to enter judgment order.

"THE COURT: In the amount set forth?"

"MR. RYDER: Yes.

"THE COURT: Could not an order be entered showing the Court's rejection of the proof?"

"MR. SPICER: Yes, and I have presented an order which reads that the Defendant, having no further defense to present, it is considered that the Plaintiff recover the amount as stated."

At the conclusion of the trial, the District Court sustained the Respondent's motion to exclude the work sheet evidence tendered by the Government as Exhibit 1 (R. 42-A), on the

ground that such evidence would not affect or vary the applicable rate, which was the domestic tariff rate from Pontiac to Newport News (R. 40-41). No further defenses being presented on behalf of the Government, the Court thereupon entered final judgment in favor of the Railway Company, based on this rate (R. 26-27). The amount awarded included various uncontested items.

By virtue of the Stipulation of Counsel entered into prior to the trial of the present case (R. 21) and the final judgment entered in Case No. 1268, the Government now expressly concedes that "it is foreclosed" from challenging herein the applicability of the domestic (tariff) rate to that portion of the shipments, if any, which was not eventually exported." (Pet. 9, footnote 7 and Government Brief, p. 8, footnote 5). This also is in accord with the position taken by its trial attorney and was so recognized by the District Judge (R. 22, 26, 31 and 41).

District Court Rulings

In Case No. 1268, the filed "Conclusions of Law" of the District Judge show a holding that the original good faith intent of the shipper that the articles be exported, was not a controlling rate factor and did not, under the governing tariffs, make the export rate applicable, and that the published rates were conclusively presumed to be reasonable (Pet. 32-33).

Likewise, the transcribed oral opinion of the same Judge in the instant case shows a clear finding that the Government had voluntarily "diverted, or caused to be diverted," the shipments involved, and that the "proof of ultimate exportation from other ports," as indicated by its proof, was not such as to justify application of the export rate under the circumstances shown (R. 41).

Court of Appeals Rulings

The Court of Appeals for the Fourth Circuit, in its decision sustaining the ruling and judgment of the trial court, reported at 224 F. 2d 443, held that what was begun as an export movement, was voluntarily converted by the shipper into a domestic shipment; that the case was "clearly governed" by its former decision in Case No. 1268, "and nothing further need be added to what was there said." It further held that "the question of which rate was applicable to the shipment(s) under the circumstances of the case (was) a question which the court (District) was competent to decide," and that no question of reasonableness was actually involved.

As entirely independent and additional grounds supporting the result, it held that there were no administrative questions presented; that all parties before the court "were barred by limitations" from obtaining the relief sought; and that, in any event, the Commission was then without power to entertain any reference. It is submitted that these rulings, as well as those of the District Court, were plainly right.

SUMMARY OF ARGUMENT

1. Both the District Court and the Court of Appeals made a finding of fact that the Government itself voluntarily converted the shipments involved, from export shipments into domestic shipments, after they reached Newport News. These findings were not in dispute and they fully justify an affirmance of the judgments of both courts.

2. The Respondent presented uncontested proof that the only published export tariff rate provision which might have

been applicable to the articles transported, specified that it applied only on freight which did not leave the possession of the port rail carrier, unless and until delivery be made direct to the vessel or its dock or pier. Such tariff had no application to Pacific coast points through which, it was claimed, some of the shipments were ultimately exported. Also, separate, intervening, domestic movements of the articles were made on new domestic bills of lading, on which domestic tariff charges were paid by the Government without controversy. A clear case was made for the application of the domestic tariff rate to Newport News.

3. The record of the case in the District Court affirmatively shows that the denial of the motion for a reference to the Commission on the question of the reasonableness of the domestic tariff rate was based upon a lack of merit to support such motion. The nature of the inquiry and the proof or avowal of proof tendered did not justify such a reference.

4. The opinions of both the District Court and the Court of Appeals plainly showed that a determination of the reasonableness of the domestic rate was not necessary to the result in the instant case. There were no complicated administrative questions presented or suggested.

5. In any event, the two-year limitation provided for challenging the reasonableness of a rate before the Commission is jurisdictional and deprives the Commission of power to act upon a claim of unreasonableness thereafter filed. This nature of the limitation has been recognized for more than forty years by this Court and has been consistently enforced by the Commission. It applies to a judicial reference as well as to an independent proceeding.

ARGUMENT

I.

Concurrent Findings of Courts Below That Shipments Were Voluntarily Converted by the Government from Export Shipments into Domestic Shipments Warrant an Affirmance of the Judgment.

As already pointed out, the informal opinion rendered by the District Judge at the conclusion of the hearing before him on February 10, 1955, shows a clear finding of fact that there was a voluntary conversion of the shipments involved by the Government after they reached Newport News, from the status of export shipments into domestic shipments. There were at least two succeeding domestic movements before ultimate exportation.

There was a full concurrence in this finding by the Court of Appeals as demonstrated by its reported opinion.

It is respectfully submitted that the finding being on a controlling point in the case, this Court should affirm the judgment on this ground.

Tex. & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks,
281 U. S. 548, 549;

United States v. O'Donnell, 303 U. S. 501, 508;

Bodkin v. Edwards, 255 U. S. 221, 223;

Washington Securities Co. v. United States, 234 U. S.
76, 78.

Further justification for the action hereby requested is found in the similar finding made by the same courts in the previously tried companion case, No. 1268, as reported in *United States v. C. & O. R. Co.*, 215 F.2d 213 (in which no writ of certiorari was sought), together with the signed

Stipulation of Counsel filed in the instant case on January 23, 1953, as to the binding effect of a final judgment in No. 1268 (R. 21).

II.

Published Domestic Tariff Rate Was Properly Applied

As already indicated, there were no disputed questions of fact raised at the trial. Item 23030 of the published tariff, relied upon by the Government, emphatically stated that "Export Rates to North Atlantic Seaboard Ports of Export" would only apply on traffic which did not leave the possession of the port carrier until and unless delivery be made direct to the export vessel or such vessel's dock or pier. This tariff showed on its face that it had no application to shipments exported through Pacific Coast points (Exhibit A, R. 24 and 34). On the reshipment made from Newport News to Bloomfield in May 1942, new Government bills of lading were issued and separate domestic tariff charges were assessed and paid without controversy (R. 32-33, 40).

The only issue presented was a question of law—which of two tariff rates governed—a matter of the construction of ordinary words used with their usual meaning. There were no complicated or peculiar circumstances involved, and no specialized knowledge or experience was required for decision.

The Government was chargeable with knowledge that the initial carrier at Pontiac could only receive the articles for transportation in accordance with its published tariffs. It did not claim to show compliance with them. No effort was made to demonstrate that the goods could not have been shipped out of Newport News within one month, or before the fall of Rangoon, or that disaster at the latter point prevented other exportation from Newport News. Since a state

of war had already existed before the first of these shipments left Pontiac, it was already known that the Japanese military forces would overrun Burma whenever possible. The extent of the proof of what was done to the articles after their arrival at Newport News and why, is simply that they were reshipped to other domestic points in May 1942 for undisclosed purposes.

It may well have been that adequate and substantial grounds of military strategy and foresight necessitated delay and changes in war plans during the period involved, but the record is silent as to this.

The Government did take numerous steps to organize, direct, coordinate and fully control foreign ocean transportation of military supplies and personnel, as indicated by the recitals found on pages 3 to 5 of its Brief. The District Court took judicial notice of this situation, especially as to the constant movement of Lend-Lease goods of all kinds and in all directions from the port of Hampton Roads. There has been no assertion or proof herein that the Government was powerless to export military material at this time for eighteen months after it was prepared for use and sent to port for exportation. In fact, no connection was sought to be shown between the original movement of these articles to Newport News and the ultimate movement to India.

Hence, there was nothing whatever in the record at the trial to militate against the enforcement of the domestic published tariff rate—and the decision of the District Court applying it was clearly correct.

This Court has many times affirmed that the rates and charges set forth in the published filed tariffs are conclusively presumed to be reasonable and have the effect of a statute, so long as in force. It is the duty of both shippers and carriers to pay them and the duty of the courts to enforce them. See *L. & N. R. Co. v. Central Iron & Coal Co.*, 265 U. S. 59, 65;

Pittsburgh, etc. R. Co. v. Fink, 250 U. S. 577, 581; and *New York Central, etc. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 408, and *Penn. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 197.

III.

District Court Did Not Err in Denying a "Reference" to Interstate Commerce Commission on Question of Reasonableness.

It is argued on pages 12 to 16 of the Government's Brief, that the failure to export the shipments from Newport News was "solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port," and that these developments required a prior determination by the Interstate Commerce Commission of whether the existing domestic tariff rate from Pontiac to Newport News was unreasonable as to these shipments. It is elementary that the burden of at least indicating or outlining such unreasonableness would be on the party alleging it. Yet the acknowledged fact that a state of war already existed and that Rangoon fell, are the only circumstances in the record relied upon as supporting any such conclusion. This was plainly insufficient.

It is not claimed that the domestic rate was *per se* unreasonable or excessive in amount, nor was it claimed that the export rate should be applied as a matter of tariff construction. Also, it has been conceded that as to those shipments in the present litigation which could not be shown to have been ultimately exported, the applicability of the domestic rate could not be challenged.

It is contended on page 15 of the Government's Brief that a group of Commission cases, of which *C. B. Fox Co. v. Gulf, Mobile & Ohio R. Co.*, 246 I. C. C. 561 and *General*

Carloading Co., Inc. v. B. & O. R. Co., 266 I. C. C. 243, are typical, and in which reparation was awarded, are persuasive authorities to show that the domestic rate was unreasonable herein.

Those proceedings were all situations in which, because of a lack of available vessel space, certain tariff provisions were held to be unreasonable as to particular private shippers who had exercised due care in advance to insure that their shipments would reach their respective destinations, and where, because of unforeseen subsequent occurrences entirely beyond their control, exportation could not be carried out as planned.

Thus, *C. B. Fox Co. v. Gulf, Mobile & Ohio R. Co., et al.*, 246 I. C. C. 561, was a proceeding in which the Commission was asked "to authorize defendants to waive collection of the undercharges," on certain shipments of soybeans intended for export. After moving from East St. Louis, Illinois to Mobile, Alabama in October, 1939, the soybeans were stored in a warehouse awaiting arrival of a steamer for Holland, on which space had been previously contracted for. Before the steamer arrived, the second World War broke out in Europe, and the President of the United States issued a proclamation forbidding American ships to enter the war zone. Numerous unsuccessful efforts were made to export the soybeans to other points and by other vessels before they had to be sold locally because of the absolute prohibitions then imposed on private ocean shipping.

The report of this case shows that the defendant carrier was "agreeable to the protection of the export rate in this instance, with the understanding that the action taken herein shall not be used as a precedent in any other proceeding, but that each proceeding shall be determined by the facts and circumstances surrounding the particular movement." This,

therefore, shows that no general rule was intended to be established by the Commission in approving what was actually a consent agreement between the parties.

It is clear that the circumstances surrounding the shippers in those types of cases were in direct and reciprocal contrast with those present here. The Government was fully recognized at this time as being the preferred shipper as a matter of absolute law, with respect to military goods and personnel. By virtue of the various acts, regulations and restrictions mentioned on pages 3 to 5 of its Brief, it had taken full control of United States ocean shipping facilities to insure full priority to its military traffic and needs. These facilities were available at Hampton Roads, as well as elsewhere. But those same acts and regulations, including embargoes and requisitions of private property, were the means and causes by which private ocean shipping was completely stifled.

Furthermore, whereas the private shippers in the cases cited had every reason to believe that their goods would reach destination without human opposition, the Government knew that war having begun, all of its ocean shipments were subject to possible enemy attack and destruction. This was a risk assumed by it as a normal military risk, rather than by the carriers.

The Court of Appeals for the Fourth Circuit, in the appeal in Case No. 1268, accurately appraised and distinguished the above mentioned Commission proceedings in 215 Fed. 213, 216, as follows:

"In those cases, however, it appeared that the shipper's ability to export the commodities was completely ended by causes over which it had no control, not as here that the shipper abandoned the intention to export because one export channel was closed, when others were open.

and thus voluntarily converted a movement which had begun as one for the export of goods to one in domestic commerce."

It is further worthy of note that there are just as many wartime reparation reported cases in which the Commission specifically upheld the application of domestic rates to so-called "frustrated" shipments of private shippers, as not being unreasonable. See *Hanlon-Buchanan v. Burlington R.I.R. Co.*, 258 I. C. C. 519, affirmed 263 I. C. C. 603; *California Texas Oil Co. v. Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chemical & Fertilizer Co. v. Penn. R. Co.*, 286 I. C. C. 468, and *American Republics Corp. v. Wichita Falls & S. R. Co.*, 259 I. C. C. 605. In these cases, the shippers showed a willingness "to take a chance of obtaining the necessary vessel space," and were denied relief.

The very existence of these cases demonstrates that the Commission was quite careful not to make any all-inclusive ruling that all so-called "frustrated" shipments during the war period were automatically entitled to the lowest published rate, regardless of what circumstances surrounded the "frustration" and what means were available and utilized by the shipper in efforts to avert the damaging consequences.

War Materials Reparations Cases, reported in 294 I. C. C. 5, *et seq.* (1955), involved a consolidated reparation proceeding including a large number of complaints attacking specific rates, charges and practices of various rail carriers during the period of 1941 to 1946, on Government freight. In denying relief there, the Commission said in part, at page 46:

"The decisions involving so-called 'frustrated' shipments such as *General Carloading Co., Inc. v. B. & O. R. Co.*, 266 I. C. C. 243, cited by the complainant are

readily distinguishable from the instant proceedings. There compliance with the applicable tariff provision was impossible because of non-availability of vessel space, occasioned by circumstances unforeseen when the shipments left points of origin. Rates higher than the export rates and the export rules, under the extraordinary circumstances there present, were found unreasonable because those circumstances were not foreseeable or susceptible of control by the shipper. Here the complainant's shipments conformed to its customary and predetermined plan and purpose. The circumstances attending their handling at and beyond the ports were not unanticipated so as to call for a change in such handling, but were completely under its control."

It is worthy of notice that *General Carloading, Inc. v. B. & O. R. Co.*, *supra*, which was held to be so "readily distinguishable," in the above situation, is the latest among the group of Commission decisions cited on page 15 of the Government's Brief in this case and relied upon by it so strongly. These decisions are all likewise fully distinguishable from the instant case for the identical reasons stated.

The apparent keystone of the Government's entire argument that there should be a "referral" of the question of reasonableness of the domestic tariff rate in this case, is the following single sentence contained in the opinion of this Court in the case of *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, at page 291:

"Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

Three times is this isolated clause snatched from its context and quoted superficially in the Government's Brief in this case, in support of a legal proposition which is the very

reverse of the holding of the case itself, once in the Petition, at page 15, and twice in the Brief, at pages 10 and 13.

In reply to the shipper's contention that an exception to the tariff rule made it inoperative as to this shipment, the carrier argued that since the rule and exception had not been construed by the Interstate Commerce Commission, the Court was without jurisdiction to try the case. In upholding the court's jurisdiction and a judgment based upon a tariff construction in favor of the shipper, the Court said in part (at pages 290 and 291):

"The validity of the tariff, including the rule and exception, was admitted. And there was no dispute concerning the facts. The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction."

And at page 294:

"Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

Hence, an analysis of the entire opinion and the stated facts of the above case and applying the tests set forth in the opinion actually supports this Respondent's position that no reference of the question of reasonableness to the Commission was needed or appropriate here. Compare *Armour & Co. v. Alton R. Co.*, 312 U. S. 195, 201-202.

In concluding the discussion under this heading, it is to be noted that, as was stated by the Court of Appeals (R. 44):

"The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment(s) under the circumstances of the case, a question which the court was competent to decide."

The Government has carefully avoided any mention of the tariff rates in terms of dollars and cents. It launches its complaint on a more abstract level. It concedes that the established domestic rate is correct under ordinary circumstances, but claims that another already established rate (the existing export rate, whatever the amount may be) should be applied under these alleged unusual circumstances. It does not ask for a reference in order that another rate may be set up by mathematical calculation, based on such factors as may be involved. No accountants or experts are needed to handle any voluminous figures or technical language.

While the inquiry is superficially called a "reasonableness" of rate investigation, it is in essence a determination of whether the Government's own acts, with the facilities available to it, entitle it to special consideration or exoneration, with respect to the established rate. This is a practical question, an issue akin to those which courts handle every day without the aid of experts. It is similar in nature to the situation presented where a common carrier of goods, on being sued by a shipper for loss of goods in a severe storm, asserts "Act of God," as a defense. Such a defendant, of course, must not only establish the existence of a storm of "Act of God" proportions, but must further show that the loss of these particular goods was directly due to such a peril, and also that it was not reasonably possible for the loss to be

foreseen and averted by it. Hence, the inquiry actually sought here was not one of rate "reasonableness" in the usual sense, but one which the District Court was fully equipped to undertake and determine, without the aid of any other government agency, just as "reasonable care" is, in the ordinary tort case. The District Court, at the conclusion of the pre-trial hearing, had announced that it was prepared to hear evidence on which rate to apply (R. 22-23), but the Government failed to offer proof to sustain its position at the hearing on the merits, presumably because it had no such proof.

IV.

Consideration of Two-Year Limitation Period of Section 16(3) (b) of Interstate Commerce Act Was Not Essential to the Decision in This Case.

An examination of the District Court record shows clearly that there was no mention made in that court by either the District Judge or counsel, of the two-year limitation period contained in Section 16(3) (b) of the Interstate Commerce Act. The denial of the Government's motion to refer the case to the Commission was a denial based squarely on the merits of the motion, without consideration of any time limitation. Nothing had been submitted in support of the motion except that a state of war existed before the shipments had started; that the Government was in control of ocean shipping; that the shipments had been prepared for military purposes, and that as an incident of war, the port of Rangoon had fallen to the Japanese forces. No witness testified to show that any specialized administrative matters had to be passed on in deciding the case.

Nor was consideration of the two-year limitation regarded as necessary to a decision of the case by the Court of

Appeals. This is demonstrated by its opinion, in which it recites the one factual difference between this case and Case No. 1268, and then concludes:

"The case, we think, is clearly governed by our former decision and nothing need be added to what was there said."

This conclusion is in full accord with what has been this Respondent's position.

In its Brief filed in the Court of Appeals, the Government had suggested that a hardship had been created by the fact that this Respondent's suit was not affected by the two-year limitation of Section 16(3)(a) of the Interstate Commerce Act, whereas the Government's right to prosecute unreasonableness complaints before the Commission, as to the same shipments, was barred by the two-year limitation in Section 16(3)(b) of the Act.

It was only in response to this statement of counsel for the Government that the Court of Appeals, after having fully decided the case, made additional observations to the effect that this was not a case involving complicated administrative questions, and that in any event, "all parties before the Court were barred by limitations" from seeking relief from the Commission. The Respondent fully concurs in the soundness of this latter observation of the court, as will be hereinafter shown, even though it was not necessary to a decision of the case.

On the record of the case, the Respondent had to bring this action in the District Court under the Tucker Act (Title 28 U. S. C., Section 1346(a)(2)), or in the Court of Claims (Title 28 U. S. C., Section 2501), in order to obtain payment. The Interstate Commerce Commission had no jurisdiction to hear it. If the existing situation, of having a two-

year limitation period apply to complaints of unreasonableness, as compared with the longer period of six years allowed for bringing undercharge suits in the Court of Claims, has any "unfair" or "uneven" effect, it is not a matter for which the carriers may be blamed. It is an objection based entirely on two independent Acts of Congress—for which this Respondent is not to blame.

But any seeming hardship which may now exist, was created in this instance by the delayed but deliberate act of the Government itself, in making use of the "cut back" remedy of Title 49 U. S. C., Section 66. That is an optional privilege by which the General Accounting Office purports to put into immediate effect its own views as to the proper freight charges due. It was not resorted to for these freight charges until 1946, four years after the charges originally assessed had been paid. If unreasonableness of the freight rate was the ground for making the "cut backs," as it presumably was, advance consideration should have been given as to whether, where and when that issue might be litigated thereafter, if need be. During the two-year limitation period, the Government voluntarily chose to rely upon the *ex parte* decision of its General Accounting Office, rather than submit the matter to the Interstate Commerce Commission for determination. At that time, it elected not to go before the Commission. Now it inconsistently pleads for that very privilege.

There was no showing made at the hearing of the ease that the General Accounting Office did not know the facts regarding these shipments or could not have ascertained them during the statutory limitation period. Nor was there any assertion or proof that the period allowed was inadequate for discovering them. As already stated, there was no reference whatever to this period in the District Court proceedings.

There is a well-settled rule of judicial administration that where damages are sought by a party for the violation of a statute and the statute itself provides an administrative remedy, such remedy must first be exhausted. In this instance, there was a remedy available for two years, assuming that the Government had proper grounds for a reference, but the remedy was not then resorted to. This rule would seem to apply here.

See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, and *First National Bank v. Weld County*, 264 U. S. 450.

Certainly, it is not sufficient for any shipper, on being sued for unpaid published tariff charges, to belatedly come into court and simply assert "charges are unreasonable," and thereby stave off liability, without any further foundation or effort.

V.

The Two-Year Limitation for Challenging Reasonableness of a Rate Before the Interstate Commerce Commission Is Jurisdictional and Limited the Commission's Power to That Period.

This Respondent hereby adopts in its behalf here, the Argument presented at pages 23-39 in the Brief filed for the Respondents, The Western Pacific Railroad Co., Bangor and Aroostook Railroad Co., and Seaboard Air Line Railroad Co., in Case No. 18 on the October Term, 1956 Docket of this Court, styled "*United States v. The Western Pacific Railroad Co., et al.*" as to the correctness of the statement therein that expiration of the two-year statutory limitation period for challenging the reasonableness of a rate before the Interstate Commerce Commission, deprives the Commis-

sion of jurisdiction to receive the Government's contentions as to alleged unreasonableness of the domestic published rate in this case.

CONCLUSION

It is respectfully submitted that the two decisions and judgments in the courts below were plainly right, and were fully in accord with reason and legal authority. The District Court was entirely competent to pass upon the uncomplicated set of facts presented and to apply the clear provisions of the appropriate tariff thereto. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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